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No. 94-91

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ARTHUR M. POMPONIO,

Petitioner,

v.

BOARD OF SUPERVISORS OF FAUQUIER COUNTY, VIRGINIA, PLANNING COMMISSION OF FAUQUIER COUNTY, VIRGINIA, FAUQUIER COUNTY, VIRGINIA AND RICHARD MCNEAR, PLANNING DIRECTOR OF FAUQUIER COUNTY, IN HIS OFFICIAL CAPACITY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals has impermissibly defeated the jurisdictional and remedial purposes of 42 U.S.C. §1983 by adopting a rule of *Burford* abstention that requires a federal court to dismiss virtually all federal constitutional claims arising from the administration of local land use regulations, thereby effectively depriving an entire class of persons, including the petitioner, of the access to federal courts guaranteed by the Civil Rights Acts of 1871.

LIST OF PARTIES

The petitioner, Arthur M. Pomponio ("Pomponio"), was the plaintiff in the federal district court and the appellant in the court of appeals.

The individual respondents include (1) the Board of Supervisors of Fauquier County, Virginia; (2) the Planning Commission of Fauquier County, Virginia, (3) Fauquier County, Virginia and (4) Richard McNear, the Planning Director of Fauquier County, in his official capacity. The respondents were defendants in the federal district court and were also the appellees in the court of appeals.

The amicus curiae upon rehearing in the court of appeals was the Local Government Attorneys of Virginia, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Arthur M. Pomponio respectfully petitions the Court for a writ of certiorari to review the order and opinion of the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, as entered on April 15, 1994.

OPINIONS BELOW

The opinion of the court of appeals, sitting *en banc*, including the dissenting opinion, is published in *Ar-*

thur M. Pomponio v. Board of Supervisors of Fauquier County, et al., 21 F.3d 1319 (4th Cir. 1994) and is reprinted in the Appendix at 1a. The court's *en banc* decision followed a decision by a majority of the court to grant a petition to reconsider and suggestion for rehearing *en banc*. App. at 23a. The previous decision of a three judge panel was not reported and is reprinted in the Appendix at 24a. The decision and order of the district court was not reported and is reprinted in the Appendix at 33a.

JURISDICTION

The U.S. Court of Appeals for the Fourth Circuit, sitting *en banc*, issued its order and memorandum opinion on April 15, 1994. This Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Civil Rights Act of 1871, 42 U.S.C. §1983, provides in relevant part that:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The relevant portion of 28 U.S.C. §1343(a)(3) provides that the district courts shall have original jurisdiction

of any civil action authorized by law to be commenced by any person:

* * *

> To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . .

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case involves the right of a citizen under 42 U.S.C. §1983 to employ the federal courts for the vindication of his constitutional rights of due process and equal protection and to recover compensatory damages for violations of those rights. In this case, a majority of the Court of Appeals for the Fourth Circuit, sitting *en banc*, has relied on the judicial doctrine of *Burford* abstention to create a rule of abstention that, absent exceptional circumstances, requires a federal court to dismiss federal constitutional claims filed under §1983 whenever such claims chance to arise in the context of state or local land use regulation. Relying on this rule of abstention, the court of appeals dismissed Pomponio's §1983 claim and relegated him to whatever remedies may be avail-

able in state court without considering the adequacy or availability of such remedies or the effect of dismissal on his federal claims or remedies. The court's categorical rule of *Burford* abstention is in conflict with the decisions of this Court and is antithetical to the broad federal jurisdiction and remedies created by Congress in enacting 42 U.S.C. §1983.

A. Pomponio's Constitutional Claims[1]

Pomponio is a real estate investor and developer. In 1989, he acquired the right to develop certain property located in Fauquier County, Virginia. In reliance on the then existing local ordinance, he expended substantial sums to develop the plans necessary to develop the property as a minor residential development which was permitted as a by-right use under the local ordinance. Although Pomponio's development plans were subject to ministerial review for compliance with the technical requirements applicable to this type of minor residential development, there was no need to acquire any further discretionary approvals from the local government.[2] Pomponio's plans complied with

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[1] The facts as alleged by Pomponio in his complaint are briefly described herein. The original complaint is included as part of the Appendix at 35a. In their respective memorandum opinions, the panel (App. 24a) and the court of appeals (App. 1a) each separately summarized what each believed to be the relevant facts. It is Pomponio's contention that at this stage of the proceeding, the facts alleged in the Complaint must be taken as true.

[2] In Virginia, it is well established that the review and approval of such plans is a ministerial act. *Planning Comm'n v. Berman*, 211 Va. 774, 180 S.E.2d 670, 672 (1971); *Board of Supervisors v. Horne*, 216 Va. 113, 215 S.E.2d 453, 457 (1975); *Potomac Greens Assocs. Partnership v. City Council of the City*

the technical requirements of the local ordinance. In compliance with local requirements, before formally submitting his plans, he presented them to local officials who raised no objection. He subsequently submitted his plans, which were accepted by the staff, again without objection or negative comment.

Shortly after Pomponio submitted his plans, the local supervisor, without ever reviewing the plans, announced his opposition to the plan and stated his intention to delay or otherwise restrict the development. In apparent response to this directive, local officials, including the planning director Richard McNear ("McNear"), entered into an unlawful scheme to improperly delay and otherwise restrict Pomponio's ability to use his property. Together, McNear and other local officials acted to delay and restrict development of the property by attempting to impose limitations and restrictions on the development that were, in fact, not permitted by the then existing ordinance. Pomponio was not aware of this effort until immediately before the local commission considered his plans. When he became aware of what McNear was attempting to do, Pomponio pointed out that such restrictions were not applicable to his plan and in fact had not previously been applied to such developments. Despite these objections, based on McNear's advice, the local commission denied Pomponio's plan.

It is now apparent that both McNear and other local officials were well aware of the fact that the local ordinance, by its express terms, did not permit

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of Alexandria, 761 F.Supp. 416, 420-21 (E.D.Va. 1991), *rev'd and vacated on other grounds*, 6 F.3d 173 (4th Cir. 1993). Thus, a plan which complies with the requirements of the local ordinance must be approved.

them to restrict or otherwise limit Pomponio's development rights. At the very same time that these local officials, including McNear, were attempting to restrict Pomponio's use of the property, they were actively attempting to change the existing local ordinances to provide them with such authority. In several contemporaneous memoranda to the Board, during July and September, McNear recommended that it change the ordinance. In each of these memoranda, McNear acknowledged that the Board lacked the authority to impose such restrictions under its existing ordinances. Pomponio was not aware of these memoranda at the time his plan was being reviewed. However, despite his statements in these memoranda, in his public statements on the plan, McNear continued to assert that the local ordinance did allow him to restrict such developments and he continued to assert that he indeed had the authority to apply such restrictions. McNear also falsely stated that such restrictions were routinely applied to such plans.

The misconduct of the local Board and its various officials was not restricted to a single decision but permeated the entire local process including the original review of the plan and the subsequent administrative proceedings. These subsequent appeal proceedings were conducted and controlled by the same officials who had initially combined to apply the restrictions. In the district court it was revealed that in the course of the administrative appeal to the Board, the county attorney, in a secret memorandum to the Board, had advised the Board that Pomponio was correct when he said that the density restrictions

now being applied to Pomponio had not been uniformly applied to other similar developments.[3] Again, despite their awareness of their lack of authority and the disparate treatment being afforded Pomponio, these same local officials subsequently attempted to conceal their discriminatory treatment of Pomponio and otherwise improperly interfered with his administrative remedies.

Pomponio initially filed several different suits in the state court challenging these actions under state law and asserting his right to develop the property. While these suits were pending in state court, he lost his right to develop the property. Pomponio then elected to forego further pursuit of the state remedies that could have allowed him to use the property and to nonsuit the state actions to pursue his federal claim for compensatory damages under 42 U.S.C. §1983 in the federal court.

B. The Proceedings in the Federal Court.

In December of 1990, Pomponio filed suit in the district court pursuant to 42 U.S.C. §1983 alleging that the local government and its officials had violated his federal constitutional rights of due process and equal protection. Although his claims admittedly arose in the context of the local government's regulation of land use, Pomponio did *not* ask the federal court to administer or otherwise enforce the remedies potentially available under state law. Instead, he sought

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[3] This particular fact is set forth by the original panel. App. at 27a. Pomponio notes, as he did in the court of appeals, that this fact was not specifically alleged in the original complaint but was revealed in the course of discovery, which was still ongoing at the time of dismissal.

only to recover compensation for the damages he had experienced as a consequence of the violation of his federal constitutional rights of due process and equal protection.

The Board filed its answer and the parties commenced pretrial discovery. Before the completion of discovery, the Board filed a motion for summary judgment. Pomponio opposed the motion since discovery was ongoing and there were numerous outstanding issues of material fact. Before considering the arguments raised by the Board, the district court, *sua sponte*, entered an order abstaining from exercising federal jurisdiction based on its belief that abstention was required by the *Burford* abstention doctrine in any case arising from the regulation of land use by local or state officials. The district court dismissed the case without prejudice and instructed Pomponio to pursue whatever remedies might still be available in the state courts, without any inquiry as to whether there were in fact any such remedies.

On appeal, a three judge panel issued a unanimous opinion in which it vacated the district court's decision and remanded the case back to the district court for consideration of the merits. The panel's decision recognized the extremely narrow bounds of *Burford* abstention as articulated by this Court in *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, ("NOPSI"), 491 U.S. 350 (1989), and held, without deciding the merits of Pomponio's claim, that since a complaint for damages pursuant to 42 U.S.C. §1983 which alleged specific instances of arbitrary behavior, false statements, abuse of authority and misconduct by local officials did not involve a coherent statewide policy or a matter of substantial public import, the

district court's reliance on *Burford* abstention to dismiss the case was inappropriate.

A majority of the court of appeals then voted to reconsider the panel's decision and granted the Board's suggestion for a hearing *en banc*. Upon rehearing, the *en banc* court of appeals, in a majority opinion written by Judge Widener, affirmed the district court's decision. Judge Murnaghan, joined by Chief Judge Ervin and Judge Phillips, issued a dissenting opinion.

In the majority opinion, the court reviewed the development of the abstention doctrine, including the Court's *NOPSI* decision, with a particular emphasis on the Fourth Circuit's previous application of the doctrine in cases involving so called "land use" regulation. The court then restated the view expressed in many of these previous decisions, and said that Pomponio's case, like virtually all other such cases, necessarily involved questions of state and local land use law, and that the exercise of federal review would necessarily be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. The court held that, except in unusual circumstances, in those cases where a person's federal constitutional claims arise from state or local land use regulation, the federal courts must abstain under the *Burford* abstention doctrine to avoid federal interference with state or local land use policy. According to the court, the unusual circumstances reflecting the presence of genuine and independent federal claims include religious prejudice, preemption or First Amendment rights. The court made clear its belief that such federal claims did not include claims, such as Pomponio's, which were premised on the

Fourteenth or Fifth Amendments. The court of appeals also rejected Pomponio's request that it retain jurisdiction of his federal claims holding that the proper course in any *Burford* case is to dismiss all federal claims, without regard to whether any state forum or adequate remedies are still available to the litigant or the possible effect of dismissal on his federal remedies.

In a dissenting opinion, Judge Murnaghan, joined by Chief Judge Ervin and Judge Phillips, observed that Pomponio had not challenged the state or local regulatory regime or otherwise asked the federal court to administer or enforce the requirements of such scheme. The dissenting opinion restated the panel's previous conclusion that Pomponio's allegation of official misconduct did not involve difficult questions of state law or a situation where the exercise of federal jurisdiction would disrupt the state's efforts to establish a coherent regulatory policy. The dissenters then observed that the premature dismissal of the case, under the guise of *Burford* abstention, effectively deprived Pomponio of the opportunity to demonstrate the existence of the unusual constitutional circumstances that would allow the federal court to exercise its jurisdiction.

REASONS FOR GRANTING THE WRIT

In its majority opinion, the Fourth Circuit, sitting in this case *en banc*, has created a rule of *Burford* abstention that greatly exceeds all previous applications of this judicial doctrine and held that a federal court, in deference to local and state policy, must dismiss virtually all federal constitutional claims arising from local or state land use regulation. This case

thus presents the Court with a singular opportunity to consider whether the judicial doctrine of *Burford* abstention can be used to deny an individual his right to pursue in federal court the compensatory remedies provided by 42 U.S.C. §1983 and to require such individuals to pursue whatever remedies might be available under state or federal law in the state court.

The proposition that a federal court can refrain from exercising its federal jurisdiction has its origin in this Court's decision in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) and its progeny. The court of appeals has now seized on this limited judicial exception, to hold that the federal court may refuse to exercise its federal jurisdiction in federal constitutional claims under 42 U.S.C. §1983 when such cases arise in the context of local or state land use regulation. This unprecedented expansion of a previously limited doctrine of judicial discretion to a rule of virtual exclusion and the consequent dismissal of Pomponio's federal constitutional claims is flawed for several separate and distinct reasons. First, the federal courts do not have the authority to summarily deny a plaintiff the choice of a federal forum when the choice of such forum has been provided by Congress. Moreover, as reflected by the different approaches of the various circuits, land use regulation is not necessarily the type of complex statewide regulatory scheme that justifies federal court abstention under this Court's decision. Finally, the court of appeals' decision to deny a plaintiff the federal jurisdiction and remedies provided by Congress is utterly destructive of the federal remedies established by Congress and of its superior institutional competence to establish the scope of federal jurisdiction and rem-

edies, particularly as they apply to federal constitutional rights.

The court of appeals' decision reflects the confusion that exists in the Fourth Circuit and the lower federal courts regarding the proper use of *Burford* abstention in the land use context and a citizen's right of access to the federal courts for the vindication of constitutional rights under §1983. This confusion, and its attendant burdens on litigants, warrants the Court's attention and guidance.

A. The Court of Appeals' Decision is Contrary to the Limitations on *Burford* Abstention Established by this Court and Reflects the Considerable Confusion that Now Exists Among the Various Circuits and Lower Federal Courts.

The doctrine of abstention is a judicially-created doctrine under which a federal court may decline to exercise the federal jurisdiction otherwise provided, under certain extremely narrow circumstances.[4] Although this Court has recognized the utility of this doctrine in such limited circumstances, it has always emphasized that the various doctrines are extraordinary and narrow exceptions to a federal court's duty to adjudicate federal claims as established by Congress. *See NOPSI*, 491 U.S. at 358-359; *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813-814 (1976). Notwithstanding the well established limitations placed on the use of the abstention doctrine, the court of appeals for the Fourth

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[4] There are three generally recognized grounds of abstention. *See, e.g., Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Younger v. Harris*, 401 U.S. 37 (1971).

Circuit has now applied the *Burford* doctrine, perhaps the most limited of the recognized doctrines, so as to bar the lower federal courts in the circuit from considering virtually all federal claims which chance to arise from the regulation of land use by state or local authorities. The rationale which supports expansion of this limited exception to a rule merits considerable scrutiny.

This Court has previously recognized that *Burford* may apply in situations where adequate and timely state court remedies have been centralized in a specialized court, and where there are either difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar, or where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial concern. *NOPSI*, 491 U.S. at 360-361. The Court has also emphasized that the mere existence of a complex regulatory scheme or the potential for conflict with state regulatory law or policy, does not in itself justify abstention. *Id.* at 362.

In *NOPSI*, the Court also reiterated the oft-stated principle that the courts may not refuse the jurisdiction created by Congress since it is Congress and not the courts that defines the scope of that jurisdiction. *NOPSI*, 491 U.S. at 358 (citations omitted). The Court's emphatic recognition of the federal court's obligation to exercise federal jurisdiction and its cautionary statement that the mere existence of a complex regulatory scheme or the potential for conflict does not justify *Burford* abstention, should have disposed of any lingering misapprehension by the lower

federal courts that the mere existence of a state or local regulatory scheme is by itself sufficient to justify abstention under the *Burford* doctrine.

Despite the limitations placed on the application of the *Burford* doctrine by the Court, the court of appeals has now concluded that all types of land use regulation in the various jurisdictions that are located within the circuit necessarily involve the type of complex statewide regulatory scheme so as to warrant *Burford* abstention whenever it is asserted that the exercise of local authority has gone beyond the permissible parameters of the Constitution. The Fourth Circuit's application of this previously limited exception to abdicate to the state court its duty to exercise the federal jurisdiction provided by Congress cannot be reconciled either with the limitations on *Burford* previously established by this Court or the broad federal jurisdiction and constitutional remedies of §1983.

In apparent reliance on its own rather unique view of the *Burford* doctrine's application to land use cases, the court of appeals has thus seriously misapplied the Court's cautionary holding in *NOPSI* to create a rule of mandatory abstention that requires the federal courts in this circuit to refrain from exercising federal jurisdiction in virtually any case arising from local or state land use regulation. Despite the absence of any consolidated or specialized state judicial review, it has attempted to dispose of an entire class of cases by characterizing all forms of local and state land use regulation as an important aspect of local government and then concluding that in deference to local authority and policy, the federal courts must refrain from the exercise of their duty to protect federal

constitutional rights. Based solely on its deference to local policy, the court of appeals has thus converted what had been an exception into a rule which effectively denies persons injured by unconstitutional government conduct from bringing their claim in the federal court.

The presence of a federal basis for jurisdiction elevates the threshold required for abstention. *Colorado River Water Conservation Dist.*, 424 U.S. at 816, n.21. Yet, the court of appeals' discussion of the applicable policy concerns ignores the significant federal interests that are presented by Pomponio's claim. Indeed, its view that federal court enforcement of federal constitutional rights necessarily interferes with local policy or decisionmaking reflects a misunderstanding of the role of the federal court in administering the §1983 remedy. The local government certainly has no right or discretion to disregard the Constitution. *Owen v. City of Independence*, 445 U.S. 622 (1980), *reh'g. denied*, 446 U.S. 993 (1980). In situations where a federal court is called upon to review the conduct of local government, such review does not interfere with local policy choices or discretion. 445 U.S. at 649-650. The risk of such interference is further minimized because it is to be hoped that unlawful actions and machinations, such as are described by Pomponio, reflect an isolated abuse of power and authority rather than a widespread indifference to constitutional rights among local officials.

The court of appeals attempt to characterize all forms of land use regulation as necessarily the type of regulatory scheme requiring abstention is seriously flawed. The court's view is in stark contrast with the

realities of local regulation and the decisions of the various other circuit courts that have considered this issue. The fragmented and piecemeal nature of local land use regulation does not justify application of the *Burford* doctrine.[5] In fact, several other circuits have adopted a different view and declined to apply *Burford* in situations involving local land use regulation.

The Third Circuit has declined to apply *Burford* abstention to situations involving local land use regulation because of its recognition that such regulation does not reflect a uniform state policy, but varies widely from local jurisdiction to jurisdiction. *See, e.g., Izzo v. Borough of River Edge*, 843 F.2d 765 (3d Cir. 1988); *Heritage Farms, Inc., v. Solebury Township*, 671 F.2d 743 (3d Cir. 1982). The Ninth Circuit has also recognized that although local land use regulations may be complex, they are essentially local in nature. *See Santa Fe Land Improvement Co. v. Chula Vista*, 596 F.2d 838 (9th Cir. 1979). The Eleventh Circuit and the District of Columbia Circuits have similarly declined to apply the *Burford* abstention doctrine because of their recognition that local land use

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[5] The court of appeals' characterization of land use regulation as the type of statewide regulatory scheme involved in *Burford* is thus an extraordinary misstatement. The various forms of land use regulation—zoning and subdivision control—are in fact regarded as "a matter of primarily local concern". *See* Anderson, R.M., *American Law of Zoning*, 3d., §2.02, p.29 (1986). However, because local governments generally acquire their authority to act from the state, the court of appeals has decided that such delegation necessarily means that local exercise of this authority is tantamount to the statewide regulatory scheme required by *Burford*. If this indeed is true, there is virtually no local or state action that would be subject to federal constitutional scrutiny under the Fourth Circuit's analysis.

regulation is typically fragmented and piecemeal, and review is not concentrated in a single court. *Silverman v. Barry*, 727 F.2d 1121 (D.C. Cir. 1984); *Nasser v. City of Homewood*, 671 F.2d 432 (11th Cir. 1982).

The right of a federal claimant to bring his suit in federal court where such right is provided by a federal statute such as §1983 would seem to be beyond question. *See NOPSI*, 491 U.S. at 359. However, for many years, the lower federal courts have been grappling with the application of abstention in §1983 cases arising from local land use regulations.[6] Since the application of abstention can often turn on the factual circumstances of such cases, this Court has generally been precluded from considering the relationship between abstention and §1983. The court of appeals' adoption of an expansive rule of abstention, requiring dismissal of virtually all such constitutional claims, provides the Court with an exceptional opportunity to provide much needed guidance to the lower federal courts.

B. The Judicial Doctrine of *Burford* Abstention Cannot be Used to Deprive a Class of Persons of the Federal Jurisdiction And Remedies Provided by Congress.

The fundamental remedial objective of 42 U.S.C. §1983 was to interpose the federal courts between the people and the state as guardians of constitutional

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[6] Blaesser, B.W., *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Uses Cases*, 2 Hofstra Property L.J. 73 (1988). In this article Blaesser has extensively cataloged the various approaches to abstention that have been used by the federal courts in §1983 claims involving land use regulations.

rights. *Patsy v. Board of Regents*, 457 U.S. 496, 503-505 (1982), *quoting Mitchum v. Foster*, 407 U.S. 225 (1972). The express purpose of §1983 was not only to provide compensation for the unconstitutional actions of local officials, but to deter future violations by providing an incentive for local governments to be sensitive to potential liability and take appropriate precautions. *Owen*, 445 U.S. 622. The Fourth Circuit's application of *Burford* abstention to dismiss Pomponio's federal claim and thus deprive him of a federal forum is contrary to each of these purposes and the Court's decisions.

The federal judicial remedy under §1983 is independent of any available state remedy. *Monroe v. Pape*, 365 U.S. 167 (1961). This Court has rejected all previous efforts to encumber or otherwise burden the right of immediate access to federal court. Thus, there is no requirement to exhaust state judicial remedies. *Id.* The Court has also refused to engraft on the statute a requirement to exhaust administrative remedies. *Patsy*, 457 U.S. at 503-505. More recently, in *Felder v. Casey*, 487 U.S. 131, 151 (1988), it rejected an attempt by the state to restrict the availability of the federal remedy by conditioning availability on compliance with a state notice of claim requirement. In each of these cases, the Court rejected otherwise well intentioned efforts to dilute or otherwise restrict access to the federal court because such limitations were inconsistent with congressional intent.

The court of appeals' application of *Burford* abstention to an entire class of persons and species of constitutional claims is no less destructive of the federal remedy than these previous efforts. As this Court

has recognized, the judicial imposition of a requirement to exhaust administrative remedies would effectively repeal the jurisdiction as created by Congress. *Patsy*, 457 U.S. at 514, n. 17. Here, the court of appeal's imposition of a mandatory rule of abstention and the consequential dismissal of the federal claim, effectively repeals the broad jurisdiction and remedy created by Congress. Although the court's policy concerns may be legitimate and otherwise reasonable, it is simply without authority to modify or otherwise restrict the jurisdiction that has been expressly created by Congress. *See Felder*, 487 U.S. at 149. Where Congress has provided a choice, this choice of federal forum cannot be denied by the federal court. *NOPSI*, 491 U.S. at 359; *see also England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964) (emphasizing importance of federal forum).

The court of appeals' application of *Burford* abstention reflects its own judgment of the relative value of state and local prerogatives versus the federal court's obligation to safeguard the constitutional rights of citizens.[7] In our federal system, the judicial

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[7] The use of the various doctrines of judicial abstention to restrict access to federal courts under §1983 has been criticized by many commentators. Professor Reddish has applied a separation of powers analysis to support his argument that judicial doctrines of abstention should not be relied upon to circumvent the express jurisdiction created by Congress. Reddish, M.H., *Abstention, Separation of Powers and the Limits of the Judicial Function*, 94 Yale L.J. 71-114 (1984); *see also* Davies, *Pullman and Burford Abstention: Clarifying the Role of State and Federal Courts in Constitutional Cases*, 20 U.C. Davis L. Rev., 1 (1986); Note, *Land Use Regulation, the Federal Court and the Abstention Doctrine*, Yale 89 L.J., 1134 (1980).

policy concerns articulated by the court of appeals in support of its decision to dismiss the federal suit simply cannot support its refusal to provide the plaintiff with the federal forum and remedy provided by Congress. *NOPSI*, 491 U.S. at 359. Although the court of appeals' sensitivity to principles of comity and federalism are perhaps understandable, its application of this doctrine to deprive an entire class of persons of the federal jurisdiction and remedy that has been provided by Congress is utterly subversive of the broad remedy created by Congress.[8]

The jurisdiction and substantive role of the federal courts is ultimately subject to the institutional direction of Congress. *NOPSI*, 491 U.S. at 358; *Patsy*, 457 U.S. at 513. This Court has repeatedly acknowledged that such policy decisions are best left to the superior institutional competence of the legislature. 457 U.S. at 513. Although the various doctrines of judicial abstention articulated by this Court reflect its sensitivity to the tensions that are generally inherent in our nation's federal system, it has consistently deferred to the intent of Congress and recognized that the federal remedy under §1983 must be given the broadest application and scope. For this reason, the potentially conflicting interests identified by the court of appeals are best resolved by the legislature and not by the court.

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[8] This Court has previously invited congress to resolve the potential policy conflict of state and federal jurisdiction. *See Patsy*, 457 U.S. at 516 (O'Connor, J., concurring). To date, Congress has declined to accept this invitation. *See* Shonkwiler, J.W., Morgan, T.D., *Land Use Litigation*, §13.06, n.2-6 (1986) (discussing several unsuccessful congressional proposals to limit local government lability under §1983).

C. The Court of Appeals Cannot Refuse to Exercise Federal Jurisdiction Based on its Own Perception of the Relative Value or Importance of the Constitutional Protections at Issue.

In this case, Pomponio alleged that the official misconduct of local officials had violated the constitutional guarantees of due process and equal protection. In its opinion, the court of appeals clearly suggests that Pomponio's claims of due process and equal protection, and most other claims arising from local or state land use regulation, are somehow distinguishable from other more genuine federal constitutional interests such as those involving the First Amendment, religious prejudice or preemption. The court of appeals' decision suggests that it apparently believes that the constitutional rights of due process and equal protection arising under the Fifth and Fourteenth Amendments are somehow less worthy of federal court protection.

The constitutional injuries alleged by Pomponio are neither imaginary nor without precedent. The constitutional guarantees of due process and equal protection apply to the regulation of land use by local government. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). The local government certainly has no discretion to violate these constitutional rights, even in the context of land use regulation. *See Owen*, 445 U.S. at 649-650. The Fourth Circuit has itself previously recognized that local government regulation of land use can and, at times does, violate the constitutional safeguards of due process and equal protection. *See Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983) (regardless of the de-

ference normally shown in local land use the constitution does not tolerate official abuse); *Marks v. City of Chesapeake*, 883 F.2d 308 (4th Cir. 1989). The constitutional interests asserted by Pomponio are recognized by virtually every other federal circuit.[9]

The Fifth and Fourteenth Amendments and the rights guaranteed therein are as much a part of the Constitution as the First Amendment. The court of appeals' apparent suggestion that such constitutional rights and interests, particularly arising in land use regulation, are somehow less worthy of federal court protection is clearly unwarranted. In the past term, in *Dolan v. City of Tigard*, 1994 WL 276693 (June 24, 1994), Justice Rehnquist responded to a similar suggestion and writing for the majority observed:

> We see no reason why the Taking Clause of the Fifth Amendment as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . .

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[9] *See, e.g., Bello v. Walker*, 840 F.2d 1124 (3d. Cir. 1988), *cert. denied.*, 488 U.S. 851 (1988), *and cert. denied*, 488 U.S. 868 (1988); *Bateson v. Giesse*, 857 F.2d 1300 (9th Cir. 1988); *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986); *Southern Co-op Dev. Fund v. Driggers*, 696 F.2d 1347 (11th Cir. 1983), *reh'g. denied*, 703 F.2d 582 (1983), *and cert. denied.*, 463 U.S. 1208 (1983). In fact, even the First Circuit, which shares the Fourth Circuit's reluctance to become involved in "garden variety" land use disputes, would recognize a constitutional cause of action for the violations described in the Complaint. *See Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir. 1982), *cert. denied*, 459 U.S. 989 (1982).

As the decisions of this Court clearly recognize, the constitutional protections of the Fifth and Fourteenth Amendment are alive and well and worthy of judicial protection, even in the context of local land use regulation. There is certainly no valid basis in this Court's decisions or the legislative history of §1983, to justify relegating these provisions to the status of a poor constitutional relation.

Pomponio does not now assert that all cases or disputes arising from local or state regulation of property necessarily involve or otherwise invoke federal constitutional claims or issues. However, as the original panel and dissent have each recognized, in those situations where a plaintiff has fairly alleged specific instances of official misconduct and abuse of power in apparent violation of federal constitutional safeguards, a person is entitled to bring this claim in the federal court. *See England*, 375 U.S. at 413-416. The fact that such abusive and illegal conduct occurred in the context of local or state land use regulation should have no bearing on the availability of a federal forum. *See Heritage Farms*, 671 F.2d at 748. To the extent that the court of appeals believes such claims have little substantive merit, there are other more appropriate procedural mechanisms available to address this concern.

The different approaches currently taken by the various lower federal courts in enforcing federal rights arising under §1983 creates considerable delay and uncertainty for those persons seeking to have their federal claims considered by the federal courts. This delay and uncertainty is not only wasteful of judicial and litigant resources, but it is wholly inconsistent

with the intent of Congress to provide for an immediate and an independent federal judicial remedy. *See Zwickler v. Koota*, 389 U.S. 241, 251-252 (1967) (discussing effect of delay).

There can be little doubt that if the *en banc* decision of this influential circuit court of appeals is allowed to stand, other federal courts, faced with the same conflicting demands and constraints on judicial resources facing the Fourth Circuit, are likely to quickly follow its example and attempt to carve out other sensitive areas of state or local regulation that are likewise immune to the federal scrutiny expressly established by Congress. Although such a result might satisfy the individual court's views of comity and federalism, such a piecemeal expansion of the judicial doctrine of abstention to immunize entire areas of local regulation from federal scrutiny would eventually destroy the uniquely federal remedy established by Congress. This Court has consistently recognized that such policy choices are properly left to Congress.

If this petition is granted, this Court can determine that the *Burford* abstention doctrine and the resulting relegation of federal constitutional claims to state court simply has no place in the remedial scheme of §1983. In doing so, the Court may choose to altogether abandon the doctrine as it applies to federal constitutional claims under §1983. Alternatively, the Court could establish more specific guidelines for the application of the doctrine that more appropriately balance the federal court's legitimate sensitivity to local and state regulatory prerogatives with the equally legitimate constitutional and statutory rights of citizens to timely vindication of their constitutional rights in the federal courts. Pomponio intends vig-

orously to argue that there is no place in federal jurisprudence for a rule of abstention which effectively prohibits the federal courts from considering federal constitutional claims arising from abusive or excessive local or state land use regulation and requiring citizens who are injured by the unconstitutional actions of local government to pursue their remedies in state courts. If the *en banc* decision of this influential court of appeals goes unreviewed, the various federal courts will continue to restrict access to the federal courts and in doing so effectively repeal the statutory remedy provided by 42 U.S.C. §1983.

CONCLUSION

For the reasons stated above, this petition should be granted and the Court should allow Pomponio to file a brief and articulate more fully the reasons why he believes the Fourth Circuits' application of *Burford* abstention and the consequent denial of access to the federal remedies and jurisdiction provided in 42 U.S.C. §1983 cannot be supported by the legislative history or the statute or the prior decisions of this Court.

Respectfully submitted,

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July 14, 1994

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-1107

ARTHUR M. POMPONIO,
Plaintiff-Appellant,

v.

FAUQUIER COUNTY BOARD OF SUPERVISORS; PLANNING COMMISSION OF FAUQUIER COUNTY, VIRGINIA; FAUQUIER COUNTY, VIRGINIA; RICHARD MCNEAR, Planning Director of Fauquier County, in his official capacity,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.
(CA-90-1694-A)

Argued: December 1, 1992

Decided: April 15, 1994

Before ERVIN, Chief Judge, and RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, WILKINSON, WILKINS, NIEMEYER, HAMILTON, LUTTIG, and WILLIAMS, Circuit Judges, sitting en banc.

Affirmed by published opinion. Judge Widener wrote the opinion of the Court, in which Judges Russell, Hall, Wilkinson, Wilkins, Niemeyer, Hamilton, Luttig, and Williams joined. Judge Murnaghan wrote a dissenting opinion, in which Chief Judge Ervin and Judge Phillips joined.

COUNSEL

ARGUED: John Francis Cahill, HAZEL & THOMAS, Falls Church, Virginia, for Appellant. Deborah Brand Baum, SHAW, PITTMAN, POTTS & TROWBRIDGE, Washington, D.C., for Appellees. **ON BRIEF:** John Holland Foote, Thomas W. Smith, III, HAZEL & THOMAS, Falls Church, Virginia, for Appellant. Patricia L. Hanower, SHAW, PITTMAN, POTTS & TROWBRIDGE, Washington, D.C.; Edward J. Finnegan, SHAW, PITTMAN, POTTS & TROWBRIDGE, Leesburg, Virginia; Paul S. McCulla, OFFICE OF THE COUNTY ATTORNEY, Warrenton, Virginia; Robert S. Corish, SLENKER, BRANDT, JENNINGS & JOHNSTON, Merrifield, Virginia, for Appellees.

OPINION

WIDENER, Circuit Judge:

The sole issue before us is whether the district court properly applied the abstention doctrine of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), in dismissing this case without prejudice. We hold that *Burford* abstention was appropriate and affirm the district court's dismissal.

I.

The plaintiff-appellant, Arthur M. Pomponio, brought this Section 1983 action against Fauquier County, the Board of Supervisors of Fauquier County, the Planning Commission, and Richard McNear, in his official capacity as Fauquier County Planning Director, in the United States District Court for the Eastern District of Virginia. The complaint alleged arbitrary behavior, false statements, abuse of authority, and misconduct by local officials during consideration of a preliminary subdivision plan submitted by Pomponio. Because of the misconduct, Pomponio alleged denials of procedural due process, substantive due

process, and equal protection. The district court *sua sponte* entered an order abstaining from jurisdiction based on the *Burford* doctrine and dismissed Pomponio's claim without prejudice. Pomponio appealed.

This dispute stems from a difference of opinion about the correct interpretation of the applicable Fauquier County zoning and subdivision ordinances. The record reveals that Pomponio is a real estate developer. In March of 1989, he contracted to purchase approximately 1,250 acres of property known as Clover Hill, which was located in the RA (agriculture)[1] and RC (conservation)[2] zoning districts. The development of a minor residential development[3] was permitted under the applicable zoning ordinance, as long

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[1] The Agriculture (RA) District generally contains those areas where agriculture and forestry are the predominant uses or where significant agricultural lands or large lot farmette type residential development exist. The regulations are designed to assist in the protections and preservation of the agricultural uses and to mitigate land use conflicts between agricultural uses and appropriately limited residential development.

Fauquier County Zoning Ordinance § 3-200(2).

The parties have not filed copies of all of the Fauquier County ordinances that pertain to this case. We obtained a copy from the Virginia Association of Counties, and we assume if there are variances between our copy and the ordinances in effect at the time, such variances are not substantive. If there are substantive variations, we assume that the party aggrieved will promptly bring it to our attention.

[2] The Conservation (RC) District contains those mountains which are environmentally sensitive, have physical limitations and contain much of the County's timber resource. The regulations are designed with emphasis on the conservation of these areas to minimize the potential adverse environmental impact while providing for compatible very low density residential uses.

Fauquier County Zoning Ordinance § 3-200(1).

[3] Under the zoning ordinance § 15-200, as pertinent here, a minor residential development is the creation of subdivided lots on any lot of record as of May 21, 1981. Clover Hill had been recorded prior to that date.

as certain maximum density and open space requirements were met.[4] Clover Hill had been previously subdivided by recorded plat into 123 building lots and one common lot.[5] Pomponio sought to take advantage of the zoning ordinance, which allowed further subdivision of a lot ten acres or greater in size.[6] He took the position that there were 96 lots in excess of ten acres in size on the original plat, which entitled him to aggregate the dwelling units allowed for each lot to produce an additional 96 dwelling units, then he added two tracts in excess of 20 acres each for six additional dwelling units, plus one dwelling unit each for 27 tracts less than ten acres.[7] Instead of subdividing each lot, however, Pomponio took the aggregate number of dwelling units to which he claimed he was entitled—222[8]—and redistributed them on the entire 1250-acre plat in a cluster arrangement. 212 of the dwelling units were placed on 350 acres with lot sizes between one and three acres, which is an average density of 1.65 acres per dwell-

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[4] Both the RA and RC districts have a maximum possible density of .1 dwelling unit per acre. Fauquier County Zoning Ordinance § 3-401.

[5] These are Planning Commission figures. Pomponio's figures of lot numbers may vary slightly from the county's from time to time, none of which is consequential.

[6] The relevant figures, as set forth in § 15-200 of the ordinance, are:

Lot Size	Dwelling units
0 -9.99	1
10-19.99	2
20-34.99	3

[7] Pomponio's other option would have been to vacate the existing subdivision plat and subdivide the entire parcel. However, he then would have been subjected to more stringent density and open space requirements, and had been so advised by the county planner on July 20 1989. If he had vacated his lots, considered as a 1250-acre tract, the staff report of August 8, 1989 advises the total yield of lots wold be 31. Not surprisingly, Pomponio chose to attempt to subdivide within the existing plat.

[8] He actually claimed 225, but included only 222 in his preliminary subdivision plan.

ing unit. The remaining ten lots were from 25-50 acres in size and are described in Pomponio's application as non-common open space homesites. In addition, Pomponio included a golf course.

On June 21, 1989, Pomponio formally submitted a preliminary subdivision plan (the Plan) for review and approval by the Planning Commission of Fauquier County. In late June of 1989, James Green, the member of the Board of Supervisors from Clover Hill's magisterial district, commented negatively about Pomponio's proposed subdivision plan during an interview with the local newspaper. Pomponio has alleged that Green had not yet reviewed the Plan, but stated, "[I]f there is any way to cut it or slow it down, I'm all for it." Thereafter, defendant McNear conducted a review of the Plan and wrote a memorandum, dated July 14, 1989, to Mike Finchum, Planner. The McNear memorandum outlined several problems with the Plan. First, the proposed subdivision of the 10+ acre lots was invalid because the resulting lots ran afoul of sections 2-308, 3-400, and 7-300[9] of the zoning ordinance.[10] Second, the ordinance did not allow for the proposed cluster arrangement, which would have required a transfer of density from one lot to another. Finally, the golf course did not qualify under the ordinance as a use in non-common open space. Finchum communicated his concerns, and particularly the concern about the cluster arrangement, to Pomponio's business partner by letter dated July 20, 1989.

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[9] Section 7-300 was dropped as an issue at the hearing before the Board of Zoning Appeals.

[10] *Limitation on Subdivision of a Lot*

> A lot that exceeds the minimum provisions of this Ordinance may be subdivided to create more lots only where the resultant lots meet such minimum provisions of this Ordinance . . . .

Fauquier County Zoning Ordinance § 2-401.

In the meantime, the Planning Commission's staff prepared a report on the Plan dated August 9, 1989. The staff concluded that 97 of the 98 10+ acre lots could not be subdivided under the zoning ordinance. Certain reductions to the size of the lots were applied in determining whether the lots were eligible for subdivision.[11] As a result, 97 of the lots could not be subdivided. According to Pomponio, the staff was erroneously instructed by defendant McNear to apply the reductions of section 2-308.2 todetermine the permitted density of the Clover Hill property. Pomponio argues that the local ordinance did not provide for the reduction in the density of minor residential developments such as Pomponio's, but that the local officials wanted to curtail his plan.

Pomponio's complaint against defendant McNear and the reduction calculations attributes weight to the fact that McNear was involved in a proposed amendment of the ordinance to authorize the reduction of permitted density on preliminary plans for minor residential development at the same time that Pomponio's plan was being considered. The proffered evidence of this is a July 17, 1989 memorandum recommending several amendments to the ordinance. However, no amendment to section 2-308 was proposed, and, in fact, the memorandum states that in determining the permitted density for rural areas, "the existing sliding scale would constitute the permitted category."[12] Pomponio further alleges that at the August 9,

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[11] Specifically, the staff applied Fauquier County Zoning Ordinance § 2-308.2(A), (B) & (D) to disqualify the lots. Subsection A allows only half of the maximum density on any portion of a lot that is covered by a flood plain, quarry, or existing body of water. Subsection B allows only 30% of the maximum density on any portion of a lot that is comprised of slopes with a grade greater than 25%. Subsection D excludes from the lot's gross area any area in an existing right-of-way.

[12] RA and RC districts are considered rural zoning districts, Fauquier County Zoning Ordinance § 3-100, so there was probably no change recommended by the memo which is pertinent here.

1989 Commission meeting, during consideration of Pomponio's plan, McNear informed the Commission that the proposed density of the Plan exceeded the maximum density permitted by law, which was, according to Pomponio, "false." Although Pomponio has used the adjective "false" both in his brief and in the complaint, as is at once apparent, the record supports no more than a difference of opinion in this garden variety zoning dispute.

Pomponio vehemently contends that McNear purposefully misconstrued the zoning ordinance. Whether the zoning ordinance was incorrectly construed is the central question in the case. Pomponio asserts that his interpretation is correct and further asserts that because McNear sent the Commission his July 17 memorandum and then met with the Commission to discuss amending the local ordinance two days prior to the Commission's consideration of the Plan, the Commission knew that McNear had made false and misleading legal statements about the Plan. The Commission nonetheless voted to disapprove the Plan on August 31, 1989. For their part, the defendants argue that Pomponio's plan never complied with the applicable ordinances and that there was no subterfuge or conspiracy here.

The record reveals that Pomponio fully argued his position on the ordinance to the Commission and provided extensive exhibits. The Commission gave three reasons for denying approval of Pomponio's plan: (1) the proposed layout of the Clover Hill development constituted a density transfer which the state enabling legislation does not permit; (2) the number of lots exceeds the maximum density permitted in the Fauquier County zoning ordinance; and (3) the proposed streets were shown to run across the land of others who had not consented to the streets.

Because Pomponio's dispute with the Commission hinged on the interpretation of the local ordinance, on September 5, 1989 Pomponio simultaneously appealed the Commis-

sion's decision to the Board of Supervisors, pursuant to Fauquier County Subdivision Ordinance § 9-6, and to the Board of Zoning Appeals, for their determination of the correct interpretation of the local ordinance.[13] Pomponio asked the Board of Zoning Appeals to defer consideration of his appeal until the Board of Supervisors acted. Pomponio apparently reargued his interpretation of the ordinance to the Board of Supervisors, and he also apparently argued that even if the reductions of section 2-308 were applicable, they had not been routinely applied by the Commission in the past and that applying the reductions to him would be arbitrary and capricious. The Board of Supervisors, chaired by Green, who had previously commented negatively on Pomponio's plan to the press, voted to deny Pomponio's appeal on October 17, 1989 and informed him in writing of the decision on October 20, 1989, essentially adopting the reasoning of the Commission. According to Pomponio, the Board of Supervisors had before it a memorandum from the county attorney, dated October 12, 1989, informing the Board that Pomponio was correct in pointing out that other subdivisions had been approved without the density reduction procedures that had been applied to Pomponio's plan.[14]

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[13] Pomponio informed each forum that he did not concede that either of them had exclusive jurisdiction and that his dual appeals were intended to preserve all of his administrative remedies. Pomponio also conceded that the staff's interpretation of the ordinance was not a determination by the County Zoning Administrator, which is a prerequisite for appellate jurisdiction in the Board of Zoning Appeals. Fauquier County Zoning Ordinance § 14-208; see Va. Code Ann. § 15.1-496.1. Judicial review in the circuit court is taken from the Planning Commission under Va. Code Ann. § 15.1-475 and from the Board of Zoning Appeals under § 15.1-497. Obviously, both administrative bodies considered they had jurisdiction for they decided Pomponio's appeals on the merits.

[14] There is nothing in the record concerning the various incidents at the Board of Supervisors' hearing on Pomponio's appeal. Because of this, we do not know what was argued to the Board and how the

Pomponio appealed the Board of Supervisors' disapproval of the Plan to the local circuit court on October 27, 1989. Pomponio also prosecuted his appeal before the Zoning Board of Appeals, which denied Pomponio's appeal on February 1, 1990, and informed him by letter of the decision on February 2, 1990. The Board of Zoning Appeals relied on its own interpretation of the local zoning ordinances that were at issue and gave thirteen reasons for the denial of the appeal. Pomponio also appealed this decision to the local circuit court by petition for certiorari on March 1, 1990. Pomponio later nonsuited his two state court cases, claiming even later in an affidavit filed in the district court that his right to purchase under the contract had expired in March of 1990 and that the seller of the property refused to extend the contract.[15] The argument goes that he therefore had no remedy available to him under state law, and so he decided to pursue a damages claim under 42 U.S.C. § 1983 in federal court. Pomponio's complaint alleged violation of his federal rights of substantive and procedural due process and equal protection. The defendants filed a motion for summary judgment,

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Board handled the question of arbitrary application of the density reductions. When this same question arose in the context of the hearing before the Board of Zoning Appeals, McNear stated that all Pomponio argued was that the density calculations were not in the records of the other subdivisions, and that Pomponio could not show any inconsistencies or errors in the interpretation of the ordinance § 2-308, only that the figures had not been kept in the record. Even now, Pomponio does not argue that any steep slope, flood plain, or right-of-way deduction was erroneously made, only that they should not have been made in any event. See also note 20, *infra*.

[15] This assertion is not supported factually in the record. The contract involved is not an option contract, rather a contract to purchase. It does not mention any expiration date or the like. In fact, Pomponio's lawyer argued to the district court that he objected to the characterization of the contract as an option. Given these facts, the district court was correct when it stated that Pomponio voluntarily gave up his contract rights and his state remedy, and Pomponio's exception to that statement by the district court is not well taken.

which Pomponio opposed. The district court, acting *sua sponte,* did not act on the summary judgment motion and instead entered an order abstaining and dismissing the case without prejudice. Pomponio then filed this appeal.

II

We review the district court's decision to abstain under the *Burford* doctrine for an abuse of discretion. *Richmond, Fredericksburg & Potomac R.R. v. Forst,* 4 F.3d 244, 250-51 (4th Cir. 1993) (citing *Brandenburg v. Seidel,* 859 F.2d 1179, 1195 (4th Cir. 1988)). We begin with the fundamental proposition that abstention is the exception, not the rule. *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 813 (1976).

A.

In *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943), the Supreme Court held that a federal district court sitting in equity may, in its discretion, decline to exercise its jurisdiction in certain circumstances if abstention is necessary to show proper regard for a state government's domestic policy. 319 U.S. at 317-18. The circumstances present in *Burford* involved a Texas oil drilling permit and a claim that, in essence, the Texas Railroad Commission had misapplied the Texas oil and gas conservation statutes, although a due process claim also was alleged. *New Orleans Public Serv., Inc. v. Council of New Orleans,* 491 U.S. 350, 360 (1989); see *Burford,* 319 U.S. at 318. The Court noted that Texas had created a central system for expeditious judicial review of the Commission's orders and that the concerns addressed by the Commission were of paramount importance to the localities involved as well as to the State of Texas. *Burford,* 319 U.S. at 325-32; see *New Orleans Public Service,* 491 U.S. at 360. The Court stated that federal court intervention would merely confuse state law and it noted that there were conflicts in the decisions of the state and federal courts in drilling permit cases. *Bur-*

ford, 319 U.S. at 327-32. The Court determined tht, in these circumstances, "[i]nsofar as we have discretion to do so, we should leave these problems of Texas law to the state court." 319 U.S.a t 332. The Court therefore affirmed the district court's decision to dismiss the case. 319 U.S. at 334.

The Court followed the principle it had outlined in *Burford* in *Alabama Public Service Commission v. Southern Railway Co.,* 341 U.S. 341 (1951). There the Court relied on the availability of adequate state remedy with court review of the administrative decision in issue, the unified nature of the state regulatory process, and the fact that the outcome of the railroad's due process claim would be determined by the "predominately local factor of public need for the service rendered," 341 U.S. at 347, in holding that the district court should have abstained from exercising its jurisdiction. 341 U.S. at 350; see *New Orleans Public Service,* 491 U.S. at 360-61. The Court's decisions in *Burford* and in the *Alabama Public Service Commission* case, together with the cases on which those decisions relied, established the abstention doctrine known as *Burford* abstention. See *New Orleans Public Service,* 491 U.S. at 361.

The Court next decided *Louisiana Power & Light Co. v. City of Thibodaux,* 360 U.S. 25 (1959). Relying on the *Pullman* abstention doctrine,[16] the Court decided, in a diversity jurisdiction eminent domain case which raised no federal constitutional issues and which raised the question of the city's power to appropriate the property under the state statute, that the district judge properly stayed federal court proceedings and retained jurisdiction over the case. The majority opinion did not cite *Burford.*

The Court's decision in *Thibodaux* has engendered a great deal of discussion about the scope of abstention and

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[16] *Railroad Comm'n of Tex. v. Pullman Co.,* 312 U.S.. 496 (1941).

when it is appropriate. 17A Wright, Miller, & Cooper, *Federal Practice and Procedure* § 4241, at 13-17 (2d ed. 1988). Some commentators assert that the Supreme Court's decision in the case created a new type of abstention, the *Thibodaux* abstention doctrine, which is applied when there is no federal claim and there is a significant and difficult question of state law that concerns matters which are particularly within the province of the state-sovereign to regulate or decide. Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 288-92 (2d ed. 1990); cf. *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 814-15 & n.21 (1976) (acknowledging that the *Burford* line of cases is similar to the *Thibodaux* line, but distinguishing between them). Although our decision today does not rely upon abstention under *Thibodaux,* we mention it because, as we discuss *infra,* some of our own land use and zoning abstention opinions illustrate the variance in decisions following *Thibodaux.*

Two of the Court's recent decisions help to clarify abstention under *Burford,* which is the type of abstention with which we are today concerned. The Court found that abstention as such was inappropriate in *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976), but nonetheless reinstated the district court's decision to dismiss the complaint for "reasons of wise judicial administration," 424 U.S. at 818, because there was a concurrent state proceeding. Although rejecting the application of any of the abstention doctrines, the Court's discussion clarified the proper role of *Burford* abstention. The Court stated:

> Abstention is . . . appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the case then at bar. . . . In some cases . . . the state question itself need not be determinative of state pol-

> icy. It is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public conern.

424 U.S. at 814.

More recently, the Court had occasion to consider and reject the application of the *Burford* abstention doctrine in a case that involved the question of federal preemption in *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350 (1989). The Court further clarified the scope of *Burford* abstention:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

491 U.S. at 361 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)). The Court explained its reasons for rejecting the application of the *Burford* doctrine in the case:

> The present case does not involve a state-law claim, nor even an assertion that the federal claims are in any way entangled in a skein of state law that must be untangled before the federal case can proceed. . . .
>
> While *Burford* is concerned with protecting complex state administrative processes from un-

> due federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a potential for conflict with state regulatory law or policy. Here, NOPSI's primary claim is that the Council is prohibited by federal law from refusing to provide reimbursement for FERC-allocated wholesale costs. Unlike a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors, federal adjudication of this sort of pre-emption claim would not disrupt the State's attempt to ensure uniformity in the treatment of an essentially local problem.

491 U.S. at 361-62 (internal quotation marks and citations omitted). Thus, the Supreme Court has directed that in the two situations it has described, a federal court must decline to exercise its jurisdiction under the *Burford* abstention doctrine, and the Court also has explained a few situations in which *Burford* abstention is not justified.

B.

We now turn to our own decisions that decide the abstention question in cases, like this one, that involve state or local zoning or land use laws. Virtually all of these cases, when stripped of the cloak of their federal constitutional claims, are state law cases. The federal claims are really state law claims because it is either the zoning or land use decisions, decisional processes, or laws that are the bases for the plaintiffs' federal claims.

Our first decision on this issue appears to be *Fralin & Waldron, Inc. v. City of Martinsville,* 493 F.2d 481 (4th Cir. 1974). There, Fralin & Waldron brought an action for a declaratory judgment, injunctive relief, and damages against the city because of its refusal to grant Fralin & Waldron a special use permit or to approve its subdivision

plan. Fralin & Waldron argued that a section of the city code was unconstitutional on vagueness grounds, and further argued that the code section had been arbitrarily and discriminatorily applied to it. Fralin & Waldron brought an interlocutory appeal that challenged the district court's decision to abstain from exercising its jurisdiction in the case.

After reviewing the dispute, we stated:

> All of [Fralin & Waldron's] claims raise legitimate questions involving municipal zoning ordinances, the correct construction of local land use as to special use permits, and the delineation of the proper scope and exercise of local administrative discretion. Understandably, the courts of Virginia have extensive familiarity and experience with such matters, and we believe that they should have the initial opportunity to pass upon them. A state adjudication may well avoid the necessity of a decision on the federal constitutional question presented as well as avoid needless friction in federal-state relations over the administration of purely state affairs.

493 F.2d at 482-83. Although our reasoning was more consistent with *Burford* abstention, we concluded that abstention was warranted on the basis of *Louisiana Power & Light Co. v. City of Thibodaux,* 360 U.S. 25 (1959).

We held that our decision in *Fralin & Waldron* was controlling in a case on similar facts, *Caleb Stowe Associatess v. County of Albemarle, Virginia,* 724 F.2d 1079 (4th Cir. 1984), in which we also applied abstention in a suit grounded on 42 U.S.C. § 1983. We repeat here our discussion of the plaintiffs' contentions in *Caleb Stowe* because they are indistinguishable for practical purposes from Pomponio's:

> [T]he plaintiffs, which are the proposed developers of the land, allege that the Board of Supervisors on the undisputed facts before it was required to approve the site plan, and that the disapproval was erroneous under state law. ". . . [T]he very narrow inquiry to determine the lawfulness of the Board's denial of the Site Plan is whether the sewerage facilities contemplated by the Site Plan are 'substantially in accord' with the Comprehensive Plan's recommended location for such sewerage facilities," the plaintiffs phrase the question in their brief. The plaintiffs further contend a county zoning ordinance controls the comprehensive plan as a matter of state law.
>
> Reduced to its essence, the action of the Board is complained of because it either failed or refused to follow, or misconstrued, matters of purely state land use law.

724 F.2d at 1080. Once again, our reasoning was consistent with *Burford*, but we relied upon *Fralin & Waldron* for the abstention doctrine applied. We relied on *Thibodaux* with respect to dismissal of the case.

In *Browning-Ferris, Inc. v. Baltimore County, Maryland*, 774 F.2d 77 (4th Cir. 1985), we finally applied *Burford* as an appropriate abstention doctrine in land use and zoning cases. Other than the initial variation in our decisions generated by the application of *Thibodaux* in *Fralin & Waldron*, we have applied *Burford* abstention to land use and zoning cases. See *infra* note 18. Along the way we have rejected litigants' claims that *Burford* is inappropriate in the absence of a special state judicial forum. *Browning-Ferris*, 774 F.2d at 80.[17] We also have reiterated

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[17] To the extent that *Browning-Ferris* is inconsistent with *Educational Services, Inc. v. Maryland State Board for Higher Education*, 710 F.2d 170, 173 (4th Cir. 1983), we follow *Browning-Ferris*. *Brandenburg v. Seidel*, 859 F.2d 1179, 1193 n.17 (4th Cir. 1988), is in accord with our decision here.

that state and local zoning and land use law is particularly the province of the State and that federal courts should be wary of intervening in that area in the ordinary case. See, e.g., *Browning-Ferris,* 774 F.2d at 79-80. In light of the Supreme Court's recent guidance on the *Burford* abstention, in which the Court stated that "we have distilled the principle now commonly referred to as the '*Burford* doctrine,' " we are convinced of the correctness of our view, for we believe that cases involving questions of state and local land use and zoning law are a classic example of situations in which "the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' " *New Orleans Public Service,* 491 U.S. at 361 (quoting *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 814 (1976)). We can conceive of few matters of public concern more substantial than zoning and land use laws. See *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926); especially *id.* at 391-95 (the Court's summary of some of the factors going to make up public concern). The proposition is not stated better than by Justice Marshall in dissent in *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974):

> I am in full agreement with the majority that zoning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.

416 U.S. at 13. It is also clear that in most of these cases requiring *Burford* abstention, the federal claim cannot be untangled from the state or local zoning or land use law. Therefore, we believe that in the usual case federal courts should not leave their indellible print on local and state land use and zoning law by entertaining these cases and,

in effect, sitting as a zoning board of appeals, as Justice Marshall so aptly put it in *Village of Belle Terre,* 416 U.S. at 13, or as that board, or a Planning Commission, or Board of Supervisors, as applicable here.

Over frequent objections and challenges and in practically every instance, we have held that, absent unusual circumstances, a district court should abstain under the *Burford* doctrine from exercising its jurisdiction in cases arising solely out of state or local zoning or land use law, despite attempts to disguise the issues as federal claims.[18] In those cases in which we have deviated from this view, the unusual circumstances, which reflected the presence of a genuine and independent federal claim, included a valid claim of religious prejudice, *Marks v. City of Chesapeake, Va.,* 883 F.2d 308 (4th Cir. 1989),[19] and a claim of federal statutory preemption as well as First Amendment rights, *Newfeld v. City of Baltimore,* 964 F.2d 347 (4th Cir. 1992).[20]

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[18] *Front Royal & Warren County Indus. Park Corp. v. Town of Front royal, Va.,* 945 F.2d 760 (4th Cir. 1991) (requiring *Burford* abstention in construing local annexation orders because they were purely local in nature with state remedies available), *cert. denied,* 60 U.S.L.W 3545 (U.S.), *and cert. denied,* 60 U.S.L.W 3646 (U.S.), *and cert. denied,* 60 U.S.L.W 3652 (U.S. 1992); *Browning-Ferris, Inc. v. Baltimore County, Md.,* 774 F.2d 77 (4th Cir. 1985); see *Neufeld v. City of Baltimore,* 964 F.2d 347, 351 (4th Cir. 1992) (noting usual rule); *Beacon Hill Farm Assocs. v. Loudon County Bd. of Supervisors,* 875 F.2d 1081, 1083 n.6 (4th Cir. 1989) (ordering the district court to consider abstention on remand); *Meredith v. Talbot County, Md.,* 828 F.2d 228 (4th Cir. 1987) (relying on both *Burford* and *Pullman* abstention). *Caleb Stowe* and *Fralin & Waldron* are also on point and were discussed in the text.

[19] *Marks* was heard in the district court after that court had abstained in order to allow Marks to exhaust his state remedies, which he did.

[20] *Neufeld* also involved an equal protection claim quite unlike those asserted in the usual zoning case. The ordinance at issue in *Neufeld* regulated the size of permissible satellite dishes depending upon the nature of the person or entity owning the dish. In the usual case, like Pomponio's, we are faced with a vague equal protection challenge in which the plaintiff claims that the conduct of the zoning officials singled

We now make plain our decisions: In cases in which plaintiffs' federal claims stem solely from construction of state or local land use or zoning law, not involving the constitutional validity of the same and absent exceptional circumstances not present here, the district courts should abstain under the *Burford* doctrine to avoid interference with the State's or locality's land use policy.

C.

In light of the views we express today it is evident that the district court did not abuse its discretion in this case by invoking the *Burford* abstention doctrine. See *Richmond, Fredericksburg & Potomac R.R. v. Forst*, 4 F.3d 244, 250-51 (4th Cir. 1993) (citing *Brandenburg v. Seidel*, 859 F.2d 1179, 1195 (4th Cir. 1988)). Pomponio's claims do not present any of the unusual circumstances that we have recognized which convert an ordinary zoning dispute into a case in which the federal courts must exercise their jurisdiction. Pomponio's argument boils down to an assertion that his plan complied with the zoning laws, and the local authorities wrongfully disapproved his plan by misapplying the laws and by abusing their authority in the decision-making process. In *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350 (1989), the Supreme Court found *Burford* abstention inappropriate in

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out the plaintiff for unfair treatment, but not because of any particular impermissible factor or legislatively-drawn class. The complaint alleges only that Pomponio's plan received "dissimilar treatment . . . without a rational or legally sufficient basis" as compared to the treatment given to similarly-situated properties. Without deciding whether such a claim even states an equal protection claim, we hold that this type of vague allegation is not an unusual circumstance which should change the ordinary rule that *Burford* abstention should be applied in zoning and land use cases. In all events, a detailed list of such alleged similarly-situated properties was filed by Pomponio with the zoning authorities and was met by an item by item denial and explanation by the county planner, all of which was considered by the Board of Zoning Appeals in rendering its decision in this matter of peculiarly local state law.

part because the claim asserted there was not "a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors." 491 U.S. at 362. Pomponio's claim is just such a claim, and under the Supreme Court's precedent and our own, the *Burford* abstention doctrine applies to his case.

III

The final issue we consider is whether the district court, having properly invoked the *Burford* abstention doctrine, properly dismissed the case instead of retaining jurisdiction. We hold that it did.

It is now accepted that the appropriate course of action in a *Burford* abstention case is to dismiss the suit. 17A Wright, Miller, & Cooper, *supra*, § 4245; *Burford*, 319 U.S. at 334 (affirming dismissal). But see *Ankenbrandt v. Richards*, 60 U.S.L.W. 4532, 4537 n.8 (U.S. 1992).

Dismissal is the usual rule in this circuit, *Meredith v. Talbot County, Md.*, 828 F.2d 228, 232 (4th Cir. 1987), and we are of opinion the district court did not err in dismissing the case without prejudice.

The judgment of the district court is accordingly

AFFIRMED.

MURNAGHAN, Circuit Judge, dissenting:

The majority characterizes Pomponio's arguments as one that "boils down to an assertion that his plan complied with the zoning laws, and [that] the local authorities wrongfully disapproved his plan by misapplying the laws and by abusing their authority in the decision making process." The majority affirms the district court's application of the *Burford* abstention doctrine on the theory that such

an argument does not merit federal interference with the State's or locality's land use policies.

Had Pomponio appealed an unfavorable decision of the Board of Supervisors or the Board of Zoning Appeals directly to the federal district court asking the federal court to reverse the state Board's decision, *Burford* abstention would be appropriate. Pomponio did not file such an appeal, however. He did not even commence a federal action until the loss of his contract to purchase the land at issue required him to nonsuit his state claims.

Pomponio has not sought an injunction. Pomponio has not requested relief that would directly affect the implementation of the state's or the locality's land use policies. Instead, Pomponio has brought a federal claim under § 1983 for an abuse of process in an attempt to recover damages for his losses. He has alleged specific instances of arbitrary behavior, false statements, abuse of authority, and misconduct by local zoning officials. These claims do not involve difficult questions of state law, nor do they involve a situation where the exercise of federal jurisdiction would disrupt a state's efforts to establish a coherent policy on a matter of substantial import.

A ruling by the district court that one or more of the defendants had taken unwarranted or abusive actions in the course of reviewing and disapproving Pomponio's plan would affect only the state's manner of doing business, not the state's substantive land use and zoning policies.* In other words, the resolution of this matter in the district court would not "leave the indelible print [of the federal courts] on local and state land use and zoning law." The appropriate remedy for a § 1983 violation would be an

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* In any event, "[a]s the Supreme Court has emphasized, a federal court should not abstain under *Burford* just because resolution of a federal question may result in overturning state policy." *Neufeld v. City of Baltimore*, 964 F.2d 347, 350 (4th Cir. 1992).

award of damages, not an injunction requiring the state to take a prescribed action regarding the disputed subdivision plan. In fact, Pomponio has lost his opportunity to act on his proposed plan because his purchase contract expired during the pendency of the dispute with state officials.

The majority has carved out a group of cases for which *Burford* abstention would be inappropriate. These cases involve unusual circumstances previously recognized by this court including religious prejudice, federal statutory preemption, and First Amendment rights, which convert an ordinary zoning dispute into a case in which federal courts must exercise their jurisdiction. Because the district court dismissed his claim, Pomponio has not had the opportunity to prove the existence of unusual circumstances, such as an apparent conflict of interest in the case of defendant McNear or an abuse of process, that surround his case.

We agree that *Burford* abstention frequently is proper when land use and zoning issues are present, but we believe that *Burford* abstention is inappropriate when a case involves "local land use issues only in a peripheral sense," and when such issues "are not presented in the context of difficult interpretations of state law of peculiar concern." *Neufeld v. City of Baltimore,* 964 F.2d 347, 351 (4th Cir. 1992). We also emphasize that "abstention is the exception, not the rule, and can only be justified in exceptional cases." *Id.* at 349. Accordingly, without expressing an opinion with regard to the merits of the substantive issues presented by Pomponio, we maintain that the district court's order abstaining from jurisdiction and dismissing without prejudice Pomponio's complaint should be vacated and remanded for further proceedings.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-1107

ARTHUR M. POMPONIO, Plaintiff-Appellant
v.
FAUQUIER COUNTY BOARD OF SUPERVISORS; PLANNING COMMISSION OF FAUQUIER COUNTY, VIRGINIA; FAUQUIER COUNTY, VIRGINIA; RICHARD MCNEAR, Planning Director of Fauquier County, in his official capacity, Defendants-Appellees

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FILED September 11, 1992

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellees' petition for rehearing with suggestion for rehearing in banc was submitted to the Court. A majority of judges having voted in a requested poll of the Court to grant rehearing in banc,

IT IS ORDERED that the rehearing in banc is granted.

IT IS FURTHER ORDERED that this case shall be calendared for argument at the December 1992 session of Court. Within ten days of the date of this order, 7 additional copies of appellant's briefs and 7 additional copies of appellees' brief shall be filed. The appellant will file 12 additional copies of the joint appendix.

For the Court,

/s/ Bert M. Montague
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-1107

ARTHUR M. POMPONIO,
Plaintiff-Appellant,

v.

FAUQUIER COUNTY BOARD OF SUPERVISORS; PLANNING COMMISSION OF FAUQUIER COUNTY, VIRGINIA; FAUQUIER COUNTY, VIRGINIA; RICHARD MCNEAR, Planning Director of Fauquier County, in his official capacity,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.
(CA-90-1694-A)

Argued: February 3, 1992

Decided: August 3, 1992

Before PHILLIPS and MURNAGHAN, Circuit Judges, and OSTEEN, United States District Judge for the Middle District of North Carolina, sitting by designation.

Vacated and remanded by published opinion. Judge Murnaghan wrote the opinion, in which Judge Phillips and Judge Osteen joined.

COUNSEL

ARGUED: John Francis Cahill, HAZEL & THOMAS, Falls Church, Virginia, for Appellant. Edward J. Finnegan,

SHAW, PITTMAN, POTTS & TROWBRIDGE, Leesburg, Virginia, for Appellees. **ON BRIEF:** John Holland Foote, Thomas W. Smith, III, HAZEL & THOMAS, Falls Church, Virginia, for Appellant. Deborah Brand Baum, Patricia L. Hanower, SHAW, PITTMAN, POTTS & TROWBRIDGE, Washington, D.C.; Paul S. McCulla, OFFICE OF THE COUNTY ATTORNEY, Warrenton, Virginia; Robert S. Corish, SLENKER, BRANDT, JENNINGS & JOHNSTON, Merrifield, Virginia, for Appellees.

OPINION

MURNAGHAN, Circuit Judge:

The plaintiff-appellant, Arthur M. Pomponio ("Pomponio"), brought the instant appeal challenging an order of the United States District Court for the Eastern District of Virginia, Alexandria Division, in which the district court, *sua sponte,* abstained from exercising its jurisdiction over Pomponio's 42 U.S.C. § 1983 action. Pomponio brought the instant section 1983 action against the Board of Supervisors of Fauquier County (the "Board") and its agents, the Planning Commission (the "Commission") and Richard McNear ("McNear") in his official capacity as Fauquier County's Planning Director. The complaint alleged specific instances of arbitrary behavior, false statements, abuse of authority, and misconduct by local officials during consideration of a preliminary subdivision plan submitted by Pomponio. Because of such misconduct, Pomponio alleged denial of procedural due process, denial of substantive due process, and denial of equal protection. The district court, *sua sponte,* entered an order abstaining from jurisdiction based on the *Burford*[1] doctrine and dismissing Pomponio's claim without prejudice. Because we find abstention inappropriate in the instant case, we vacate and remand.

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[1] *See Burford v. Sun Oil Co.,* 319 U.S. 315 (1943).

I.

Pomponio is a real estate developer engaged in the acquisition and development of real estate. In March of 1989, he contracted to purchase and develop approximately 1,250 acres of property known as Clover Hill, which was zoned for minor residential development. On June 21, 1989, Pomponio formally submitted a preliminary subdivision plan (the "plan") for review and approval by the Commission. According to Pomponio, the plan complied with the requirements of local ordinances and was accepted by the Commission without objection.

In late June of 1989, James Green ("Green"), the local Board supervisor representing Clover Hill's magisterial district, in an interview with the local newspaper, commented negatively about Pomponio's proposed subdivision before even reviewing the plan, stating, "if there is any way to cut it or slow it down, I'm all for it." During July and early August of 1989, the Commission staff reviewed the plan and prepared several reports and memoranda. According to Pomponio, the staff was instructed by defendant McNear to apply certain erroneous calculations to the plan that would reduce the by-right density of the Clover Hill property. The local ordinance did not provide for such reduction in the by-right density of preliminary plans for minor residential developments, such as Pomponio's, but the local officials apparently desired to curtail Pomponio's plan. Defendant McNear knew that the local ordinances did not provide for such reduction in the by-rights because, simultaneous with consideration of Pomponio's plan, McNear was actively involved in an attempt to amend the ordinance to authorize the reduction of permitted density on preliminary plans for minor residential development, as is evidenced by his July 17, 1989 memorandum recommending such an amendment. Moreover, at the August 9, 1989 Commission meeting, during consideration of Pomponio's plan, McNear falsely informed the Commission that

the proposed density of Pomponio's plan exceeded the permitted maximum density permitted by law.

McNear knew that the statement was a false statement of law at the time that he made it to the Commission, and proof of the falsity is contained in the county staff's own evaluative materials, as well as McNear's July 17 memorandum, advocating amending the local ordinances to comport with the calculations on by-rights and density that McNear said applied to Pomponio's proposed development. Because McNear sent the Commission his July 17 memorandum and because McNear met with the Commission to discuss amending the local ordinance two days prior to the Commission's consideration of Pomponio's plan, Pomponio insists that the Commission knew that McNear had made false and misleading legal statements about the plan; yet the Commission nonetheless voted to disapprove the plan.

Pomponio appealed the Commission's decision to the Board. The Board, chaired by Green, who had previously commented negatively on Pomponio's plan to the press, denied Pomponio's appeal. According to Pomponio, the Board had before it a memorandum from the county attorney, dated October 12, 1989, informing the Board that Pomponio was correct in pointing out that other subdivisions had been approved without the density reduction procedures that had been applied to Pomponio's plan.

Pomponio appealed the disapproval of his plan to the local circuit court and pursued an administrative appeal before the local Board of Zoning Appeals. The Board of Zoning Appeals denied Pomponio's appeal, and Pomponio appealed that decision to the local circuit court. However, in the interim, Pomponio's purchase contract for approximately 1,250 acres expired and the owner of the property refused to extend the contract. Thus, Pomponio concluded that the state remedies that would permit him actually to develop and to use the property were rendered ineffective.

Consequently, Pomponio non-suited his claims for state relief and filed suit under 42 U..S.C. § 1983 for damages in the district court, alleging violation of his federal rights of substantive and procedural due process and equal protection. After the district court entered an order abstaining from the case and dismissing it without prejudice, Pomponio filed the instant appeal. In the instant posture of the case, as in the case of a Federal Rule of Civil Procedure 12(b)(6) motion, all well pleaded facts are construed in favor of the party opposing abstention or dismissal.[2]

II.

As a preliminary matter, it is helpful to review the evolution of the abstention doctrine. According to the Supreme Court,

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959). "[I]t was never a doctrine of equity that a federal court should ex-

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[2] If the party so opposing should succeed at the present stage, he will still face the burden of proving, at trial or on summary judgment, sufficient facts to elicit a finding in his favor. *See generally Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 815 n.21 (1976).

> ercise its judicial discretion to dismiss a suit merely because a State court could entertain it." *Alabama Pub. Serv. Comm'n v. Southern R. Co.*, 341 U.S. 341, 361 (1951) (Frankfurter, J., concurring in result).

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813-14 (1976).

In delineating the narrow bounds of the abstention doctrine, the Supreme Court has recognized three types of abstention: (1) *Burford*[3] abstention; (2) *Pullman*[4] abstention; and (3) *Younger*[5] abstention. *Id.* at 814. The district court relied exclusively on *Burford* abstention in the instant case; thus we will focus our analysis on the *Burford* abstention doctrine.

In a recent opinion, *Neufeld v. City of Baltimore*, Case No. 91-2721, ___ F.2d ___ (4th Cir. May 19, 1992), we had occasion to review the development of the *Burford* abstention doctrine. *Neufeld* involved a situation in which the district court had abstained, under *Burford*, from deciding Neufeld's constitutional and preemption claim, challenging the application of a Baltimore City zoning ordinance which regulated the size and placement of television antennas. Neufeld had installed a satellite dish in his front yard when he was notified by Baltimore City that the dish violated Baltimore City zoning laws. Neufeld appealed the violation to the Board of Municipal Zoning Appeals, and then to the Baltimore City Circuit Court. After losing both appeals and being convicted on criminal charges of violating zoning ordinances, Neufeld subsequently filed suit in federal district court against Baltimore City and various city officials alleging that enforcement of the ordinance violated his constitutional rights and that the ordinance was preempted

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[3] *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

[4] *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

[5] *Younger v. Harris*, 401 U.S. 37 (1971).

by federal regulations. The district court abstained from deciding the case and dismissed it, relying on the *Burford* abstention doctrine.

In reviewing the district court's decision in *Neufeld*, we held that *Burford* abstention is appropriate in two situations:

> (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

Slip op. at 5, *id.* at ___ (quoting *New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350, 361 (1989)). We noted, however, that "the mere presence of complex state administrative processes does not necessarily require abstention, even where there exists a potential for conflict between federal and state law." Slip op. at 5, *id.* at ___ . Ultimately, we concluded that *Burford* abstention was improper in *Neufeld*, because the case involved neither difficult questions of state law nor a situation where the exercise of federal jurisdiction would disrupt a state's efforts to establish a coherent policy on a matter of substantial public import. Slip op. at 6-7, *id.* at ___ .

Pomponio's section 1983 claim, like Neufeld's claim, is not an appropriate claim for abstention. It too involved neither difficult questions of state law nor a situation where the exercise of federal jurisdiction would disrupt a state's efforts to establish a coherent policy on a matter of substantial public import. Rather, as pleaded, the case involves an alleged failure to abide by state law. No coherent policy on a matter of substantial public import is presented here. Although we have stated that *Burford* abstention frequently is proper when land use and zoning issues are

present,[6] *Burford* abstention is improper where a case "involves local land use issues only in a peripheral sense," and when such issues "are not presented in the context of difficult interpretations of state law of peculiar concern." Slip op. at 7, *id.* at ___ . Where, as here, a complaint alleges specific instances of arbitrary behavior, false statements, abuse of authority, and misconduct by local zoning officials, *Burford* abstention may not be utilized. *See Heritage Farms, Inc. v. Solebury Township,* 671 F.2d 743 (3rd Cir.), *cert. denied,* 456 U.S. 990 (1982).

Accordingly, the district court's order abstaining from jurisdiction and dismissing Pomponio's complaint is hereby vacated and the case is remanded for further proceedings.

VACATED AND REMANDED

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[6] *See, e.g., Browning-Ferris, Inc. v. Baltimore County,* 774 F.2d 77, 79 (4th Cir. 1985); *Caleb Stowe Assoc., Ltd. v. County of Albermarle,* 724 F.2d 1079 (4th Cir. 1984); *Fralin & Waldron, Inc. v. Martinsville,* 493 F.2d 481 (4th Cir. 1974). *But see Donohoe Constr. Co. v. Montgomery County Council,* 567 F.2d 603,607 (4th Cir. 1977), *cert. denied,* 438 U.S. 905 (1978).

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

CIVIL ACTION NO. 90-1694-A

ARTHUR M. POMPONIO,

Plaintiff,

v.

BOARD OF SUPERVISORS OF FAUQUIER COUNTY, *et al.*,

Defendants.

ORDER

Upon consideration of the parties' submissions regarding reconsideration of this Court's order of April 19, 1991 granting summary judgment for the defendants, it is hereby ORDERED

The plaintiff's motion for reconsideration is DENIED.

/s/ A.V.B., Jr.
United States District Judge

Alexandria, Virginia
May 10, 1991

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

CIVIL ACTION NO. 90-1694-A

ARTHUR M. POMPONIO,

Plaintiff,

v.

BOARD OF SUPERVISORS OF FAUQUIER COUNTY, *et al.*,

Defendants.

ORDER

Upon consideration of the parties' submissions and oral argument before the Court, it appears that this matter is clearly a complex state regulatory scheme of the type that properly requires *Burford* abstention by the federal court. *See Meredith v. Talbot County, Maryland,* 828 F.2d 228 (4th Cir. 1987) (county zoning scheme); *Browning-Ferris Inc. v. Baltimore County, Maryland,* 774 F.2d 77 (4th Cir. 1985) (landfill permits); and *Fralin and Waldron, Inc. v. City of Martinsville, Virginia,* 493 F.2d 481 (1974) (apartment complex special use permit). The Fourth Circuit has particularly recognized the importance of *Burford* abstention in zoning matters similar to those presented in this case, as discussed in *Meredith v. Talbot County, supra.*

Plaintiff's voluntary relinquishment of interest in the property after the time of the alleged deprivation of zoning rights does not alter the formula in this case. The complex scheme of local zoning ordinances, combined with adequate channels for administrative and judicial review, mandates *Burford* abstention in this matter. For these reasons and the reasons stated from the bench, the defendants' motion for summary judgment is GRANTED, and this case is DISMISSED without prejudice.

And it is so ORDERED.

/s/ A.V.B., Jr.
United States District Judge

Alexandria, Virginia
April 19, 1991

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Civil Action No. 90-1694-A

ARTHUR M. POMPONIO,

Plaintiff,

v.

BOARD OF SUPERVISORS OF FAUQUIER COUNTY, VIRGINIA

and

PLANNING COMMISSION OF FAUQUIER COUNTY, VIRGINIA

and

COUNTY OF FAUQUIER, VIRGINIA

and

RICHARD MCNEAR, PLANNING DIRECTOR, FAUQUIER COUNTY, IN HIS OFFICIAL CAPACITY,

Defendants.

Complaint

Arthur M. Pomponio, by counsel, files this Complaint and states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331 and 1343(a)(1), (3), and (4), for causes of action arising under 42 U.S.C. § 1983, and the Four-

teenth Amendment to the Constitution of the United States.

2. Venue is proper pursuant to 28 U.S.C. § 1391(b) as this is the judicial district in which the claims arise.

PARTIES

3. Arthur M. Pomponio ("Pomponio") is a resident of Fairfax County and the Commonwealth of Virginia and at all times relevant to this Complaint was the contract purchaser of certain real property known as Clover Hill (Clover Hill), which is located in Fauquier County, Virginia.

4. Defendant, County of Fauquier, Virginia (County), is a political subdivision of the Commonwealth of Virginia.

5. Defendant, Board of Supervisors of Fauquier County (Board), is the governing body of the County and is responsible for the adoption, administration, and enforcement of the policies, laws, and ordinances of Fauquier County, Virginia.

6. Defendant, Planning Commission of Fauquier County, Virginia (Commission), is an agent of the Board which has been delegated, among other things, the administrative responsibility and authority to review and approve preliminary subdivision plans prepared in accordance with the applicable laws of Fauquier County and the Commonwealth of Virginia.

7. Defendant, Richard McNear (McNear), was, at the time of the events described in this Complaint, the Planning Director of Fauquier County, and is named in this suit in his official capacity as an agent and employee of the Board and County. During this period of time, McNear also shared the duties of Zoning Administrator. In the course of these duties, McNear personally supervised and directed the actions of other county employees belonging to the County's Zoning and Planning Office (planning staff).

STATEMENT OF FACTS

8. Although he not a resident of Fauquier County, Pomponio has for several years been engaged in the business of acquiring and developing real property in the County. At all times relevant to this Complaint, he was the contract purchaser of a property known as Clover Hill. It is the Defendants' arbitrary and unlawful treatment of Pomponio's legitimate development plans for this property that gives rise to this action.

9. Clover Hill consists of approximately 1,250 acres and is zoned in the Agricultural (RA) and Conservation (RC) zoning districts (hereinafter referred to as the RA and RC zoning districts).

10. In September of 1972, in accord with the then applicable ordinances, a subdivision plat creating 125 lots on the Clover Hill property was duly recorded in the County's land records. The validity of this subdivision has never been contested. A copy of this plat is attached hereto as Exhibit A.

11. In Fauquier County, the Board has adopted two principle ordinances to regulate the use and development of property in the County. The local zoning ordinance establishes specific zoning districts and certain densities, uses, and regulations for each such district. The local subdivision ordinance provides, *inter alia,* specific requirements for the platting and development of property, at the densities and for the purposes authorized by the zoning ordinance.

12. The Fauquier County zoning ordinance provides for two types of residential development in the RA and RC zoning districts. A "Residential Development, Minor" or minor residential development is a by-right use which may be developed in accordance with a density scale prescribed by the zoning ordinance, without further legislative review or approvals. The second type of development, a "Resi-

dential Development, Major" or major residential development, requires additional legislative approval in the form of a special exception approved by the Board.

13. The zoning ordinance expressly provides that those properties in the RA and RC zoning districts, for which a subdivision plat had been recorded prior to May 21, 1981, may be developed as a minor residential development. Despite the overall size of the property, Clover Hill was considered to be, and qualified, as a minor residential development. In the case of a minor residential development such as Clover Hill "[T]hese by-right lots shall be calculated for each parcel of record as of May 21, 1981." The by-right density scale of the zoning ordinance provided that Clover Hill's existing lots of record could be resubdivided and developed as a minor residential development containing 222 lots.

14. On or about March 1, 1989, with knowledge of the development rights appertaining to the Clover Hill property, Pomponio contracted to purchase the property. The express purpose of the acquisition was to develop the property as a minor residential development.

15. Although a minor residential development is a by-right use which does not require any additional discretionary approval by the local governing body, a preliminary subdivision plan for such development must be submitted and reviewed by the County prior to submission of final plats and their recordation.

16. After investing a substantial sum in acquiring the contract right to Clover Hill, Pomponio then expended additional effort and money, in excess of $500,000, to design and prepare a preliminary subdivision plan (Plan) and supporting technical studies and exhibits. The Plan, as submitted, included the "Composite Plan of By Right Development" which is attached as Exhibit B and which reflects the proposed use of the property as a minor residential development.

17. In relevant part, the Plan prepared for Pomponio provided, in fact, for a minor residential development containing 222 lots and set aside sixty-eight (68%) of the property as open space. The Plan also made specific provisions for vehicular access and circulation, adequate water and sanitary waste disposal, and improved lot layout and design. The Plan complied with all of the applicable requirements of the local zoning and subdivision ordinances.

18. Under Virginia law, the owner or contract purchaser of a property who complies with the requirements set forth in the state code and local ordinance is entitled to approval of his preliminary or final subdivision plan and has a property interest in such approval. Therefore, the owner or contract purchaser who so complies has a constitutionally protected property interest in such approval.

19. In Fauquier County, the subdivider or his agent is required to confer with an agent of the County before submitting a preliminary subdivision plan. The stated purpose of this mandatory presubmission conference is to "assure that the applicant is made fully aware of all the requirements and interpretations of the existing ordinances, plus any amendments which are pending at the time of the plat preparation."

20. On June 19, 1989, Pomponio's representatives met with Michael Finchum (Finchum), a member of the County planning staff and an experienced zoning official, in the required presubmission conference. During this meeting, Finchum did not advise Pomponio's representatives of any pending amendments to the zoning or subdivision ordinance.

21. On June 21, 1989, following the required presubmission conference, the Plan and supporting materials were formally submitted to the County. The Plan was submitted, accepted, and processed as a minor residential development.

22. The local Board has delegated to the Commission the authority to review and approve preliminary subdivision plans such as Clover Hill. On June 26th, 1989, the planning staff notified Pomponio that it had accepted the Plan, and that it would be forwarded to the Commission.

23. In late June, however, immediately after the Plan had been accepted by the planning staff, James Green, the Chairman of the Board of Supervisors and the Supervisor for the magisterial district in which Clover Hill is located, was quoted in a local newspaper as saying that the Clover Hill property was a "time bomb," and that the Plan would "destroy that beautiful country." He further stated that "[I]f there's any way to cut it or slow it down, I'm all for it."

24. On August 9, 1989, McNear issued a written staff report on the Plan. A copy of that report is attached as Exhibit C.

25. In this report, McNear acknowledged that minor residential developments were an exception to the maximum density provisions generally applicable to the RA and RC zoning districts. However, he contended that the Plan exceeded the permitted maximum density because the overall density permitted on the property was subject to "density reduction calculations" based on the existence of flood plain and steep slope areas. McNear described his specific method of calculation of these density reductions and applied this calculation to each of the Clover Hill's existing lots of record. As applied by McNear, these calculations completely deprived Pomponio of the additional by-right density provided by the local ordinance for each of the property's existing lots of record, and effectively prohibited further development on the Clover Hill property beyond that shown on the 1972 plat. McNear also contended that the Plan involved an impermissible density transfer and improperly employed access over the property

of others. He did not, address the Plan's compliance with the applicable criteria of the local subdivision ordinance.

26. The Plan and its supporting technical material were presented to the Commission at its August 9th meeting. During this meeting, the Commission considered the staff report, McNear's conclusions, and an abbreviated presentation by Pomponio's representatives.

27. Pomponio did not receive McNear's August 9th report until the day of the Commission's meeting. During the meeting, Pomponio's attorney informed the Commission that he had been surprised by McNear's rationale and conclusions. The Commission subsequently tabled its consideration of the Plan until its next meeting. In the course of deferring its consideration, the Commission specifically inquired about the Plan's compliance with the subdivision ordinance. McNear indicated that he had not reviewed the Plan for such compliance, but that he would do so before the Commission's next meeting.

28. McNear knew that the conclusions set forth in his August 9th report and his testimony regarding the Plan were not only contrary to the zoning ordinance but were contrary to his previous application of the County's ordinances to similar minor residential developments and to his previous advice to the Commission.

29. In fact, on July 17, 1989, shortly after Supervisor Green's public statement opposing the Plan, but prior to the Commission's review of the Plan, McNear prepared a memorandum entitled "Suggested Changes to the Zoning Ordinance", addressed to both the Board and the Commission. In this memorandum and the accompanying attachments McNear proposed several "priority changes" to the zoning ordinance. These changes were in direct response to the Clover Hill Plan and were intended to justify McNear's opposition. A copy of McNear's July 17th memorandum is attached hereto as Exhibit D.

30. In this memorandum and the accompanying amendments McNear proposed eliminating the existing distinction between major and minor residential developments. He also proposed to change or eliminate the very provisions of the ordinance specifically relied on by Pomponio in preparing the Plan. Among the specific changes proposed by McNear was to expand the applicability of density reduction calculations by changing the existing definition of "Lot" to provide as follows:

> "For density calculations in accordance with paragraph 3-401 a lot shall constitute the entire lot, tract, or parcel as it was on record in the Clerks Office on May 19, 1981, and shall also include adjacent lots under single ownership at the time of application for residential lot development."

31. This change was particularly significant because the existing ordinance definition of lot did not refer to or apply density calculations to preliminary or final subdivision plans for minor residential developments. McNear specifically recognized that this was a change in the existing oridinance. In his memorandum, he explained that the effect of this new language would be: "[T]hat the definition of a lot be amended to include, for the purposes of residential density calculation, all lots with adjacency under single family ownership at the time of filing of an application for special exception *or preliminary plat.*" [Emphasis added]. In the same memorandum, McNear also recommended that certain longstanding provisions of the zoning ordinance which permitted "density transfers" be removed from the ordinance.

32. McNear's own statement demonstrated that the proposed amendments were intended to make density reduction calculations applicable to preliminary plans and demonstrated his knowledge that such calculations were in fact not then applicable to preliminary plans under the existing ordinance. Thus, McNear's own memorandum di-

rectly contradicted the assertions of his August 9th testimony and report on the Plan.

33. The application of density reduction calculations to the Plan was further contradicted by the information sheet entitled "Lots Permitted in RA and RC as Minor Residential Development" which was prepared and distributed by the County's planning staff to interested citizens. In relevant part, this document set forth the by-right density scale for minor residential developments in the RA and RC districts and expressly provided that "[T]hese by-right lots shall be calculated for each parcel of record as of May 21, 1981." A copy of the planning staff's information sheet is attached as Exhibit E.

34. On August 15, 1989, McNear met with the Commission to discuss the ordinance amendments he had proposed in his July 17th memorandum. Although the Clover Hill Plan was pending before the Commission, and the amendments, if adopted, would have adversely affected the development of the property, neither McNear nor the Commission informed Pomponio of this meeting or that the proposed amendments were being considered.

35. McNear was aware that the Clover Hill Plan was a by-right minor residential development. His own contemporaneous memorandum and guidance materials make it clear that at the time he prepared the August 9th report and met with the Commission, he knew that the existing ordinance did not require or authorize the application of density reduction calculations to preliminary subdivision plans for such minor residential developments. McNear also knew that the County ordinances expressly permitted density transfer and boundary adjustments and, in fact, that such adjustments were, in fact, routinely permitted for other such minor residential developments.

36. Despite this knowledge, in presenting his recommendations on the Plan, McNear not only disregarded the terms of the ordinance, but deliberately concealed and mis-

represented his own prior actions pursuant to this ordinance. On information and belief, the purpose of these false statements was to justify the rejection of the Clover Hill Plan despite its compliance with the ordinance and the County's prior practices and approvals.

37. After reviewing McNear's August 9th report, Pomponio's attorney submitted two supplemental written statements to the Commission and to the acting County Attorney, demonstrating that McNear's statements were not only contrary to the express meaning of the zoning ordinance, but to the County's prior applications of the ordinance to similar minor residential developments.

38. On August 31st, the Commission again considered the Plan. In view of his July 17th memorandum and their August 15th meeting, the Commission also knew that McNear's August 9th report and testimony were not in accord with the existing ordinances but were false and misleading. McNear not only failed to correct his prior statements and recommendations but, despite the requirements of the Virginia Code and the local ordinance, again refused to review the Plan for compliance with the requirements of the then existing subdivision ordinance. Despite their knowledge of McNear's false statements and his failure to review the Plan, the Commission adopted these statements and voted to disapprove the Plan.

39. In its written statement of disapproval dated September 7, 1989, the Commission set forth only three specific reasons for disapproving the Plan. The reasons set forth were (i) the number of the lots exceeded the maximum density permitted and calculated by the Zoning Ordinance; (ii) the proposed layout constituted a density transfer not authorized by state enabling legislation; and (iii) the streets accessing the property were shown across the land of others without their consent thereto.

40. The Commission's disapproval of the Plan was contrary to the express requirements of the ordinances and

to the evidence. It is clear from both the Commission's proceedings and written decision that it did not base its decision on a consideration of the Plan's compliance with the requirements of the ordinance, but rather on McNear's false conclusions and statements.

41. The Virginia Code authorizes the local Board to delegate the ministerial authority to review plans to the Commission. The Code does not authorize the local Board to consider appeals of the Commission's decisions, but the local ordinance requires just such an appeal.

42. On September 5, 1989, in an attempt to avoid unnecessary delay and in order to exhaust all possible remedies, Pomponio appealed the Commission's decision to the Board. In so doing, he expressly noted his objection to the Board's jurisdiction and authority in this matter.

43. On September 28, 1989, several weeks after the Commission had disapproved the Plan, but while Pomponio's appeals were still pending, McNear prepared and sent another memorandum also entitled "Suggested Changes to the Zoning Ordinance" and accompanying attachments to the Board. In this second memorandum, he forwarded to the Board the "proposed ordinance amendments" resulting from his previous memorandum of July 17th and the August 15th meeting with the Commission. As before, the amendments described in this second memorandum were again clearly intended to revise the ordinance to reflect and justify McNear's opposition to the Clover Hill Plan. A copy of McNear's September 28th memorandum is attached as Exhibit F.

44. McNear's memorandum again specifically recommended that the Board amend the specific provisions of the zoning ordinance which had been relied upon by Pomponio in preparing the Plan. In pertinent part, the amendments proposed by McNear would have eliminated the distinction between minor and major residential develop-

ments and made the density reduction calculations of the ordinance applicable to preliminary plans.

45. The Board initially considered Pomponio's appeal at a "work session" held on October 3, 1989. During this session, Pomponio's representatives presented the Plan and the supporting technical material and exhibits, and not only demonstrated compliance with the specific criteria of the subdivision ordinance, but also that access to the property was in accord with the deeds recorded in the land records.

46. McNear again did not review the Plan for compliance with the standards of the subdivision ordinance but continued to rely on the false and misleading statements of his August 9th report. In fact, McNear introduced no additional evidence or testimony in supoport of his position during the portion of the work session which Pomponio was permitted to attend.

47. In view of McNear's continuing and unwarranted refusal to review the Plan, and the Commission's reliance on his false and misleading statements, Pomponio's attorney presented to the Board specific evidence demonstrating that the Commission's decision and McNear's statements of August 9th were not only contrary to the clear meaning of the zoning ordinance but to the County's previous application of these ordinances to minor residential developments.

48. The evidence presented to the Board included a detailed analysis of six other minor residential developments which had been approved by the Defendants under the same ordinances. In each of these cases, the approved plans demonstrated the density reduction provisions of the zoning ordinance had *not* been applied and adjustments of boundaries similar to those proposed for Clover Hill had also been permitted. In view of the limited time available, the Board was informed that the cases presented were not

exhaustive, and that additional examples were contained in the County's records.

49. Immediately following Pomponio's presentation, rather than consider public testimony from McNear, the Board went directly into a closed executive session. The asserted basis for this closed executive session was Pomponio's acknowledgement that he intended to appeal the Commission's adverse action and would also appeal an adverse decision by the Board.

50. The proceedings of the Board's closed session are not reflected or contained in the public record, but on information and belief the only purpose of this closed session was to take McNear's testimony under circumstances where it could neither be heard nor challenged by Pomponio.

51. On October 17th, 1989, Pomponio's attorney provided the Board with a written summary of the information he had presented at the Board's work session. He also identified six further examples of minor residential developments where the density reduction calculations of the ordinance had either not been applied, or had not been calculated as for Clover Hill. Pomponio's attorney also pointed out that the boundary adjustments proposed for Clover Hill were permitted by the ordinance, and had been approved in other minor residential developments, and he specifically identified at least two other minor residential developments where such adjustments had been permitted.

52. In view of McNear's continuing refusal to retract his false statements, Pomponio also provided the Board with a letter from Richard H. Vogel, the president of a local engineering and surveying firm. Vogel, a professional surveyor with extensive experience with the County's subdivision ordinances and practices, confirmed that, in the case of minor residential developments such as Clover Hill, the zoning ordinance established the by-right density for each existing lot of record and that this by-right density

was *not* subject to further reduction based on the existence of flood plain, steep slopes or other site specific factors. Vogel also confirmed that the County's ordinance and previous practices under the ordinance would permit the by-right density for each lot of record to be calculated and to be allocated on the overall property in the manner proposed for Clover Hill. Vogel's statements regarding the application of these calculations and adjustment of boundaries were consistent with the planning staff's own published guidance and prior practices.

53. Vogel's statement regarding the ordinance was further supported by Pomponio's identification of at least fourteen minor residential developments located in the RA and RC zoning districts that had been approved by the County pursuant to the existing ordinances. The approved plans for these other developments clearly demonstrated that the density reduction calculations applied by McNear to the Clover Hill Plan had either not been performed or could not possibly have been performed. They also demonstrated that boundary adjustments were not only expressly permitted by the local ordinances, but were routinely permitted in similar situations.

54. Among the fourteen minor residential developments specifically identified by Pomponio, for example, was a minor residential development known as Oak Lake. The final subdivision plan for Oak Lake was approved by the Board at the same meeting at which it denied Pomponio's appeal. The Defendants' treatment of Oak Lake is particularly instructive, because not only was it considered at the same time as the Clover Hill Plan, but it involved the application of the same provisions of the existing local ordinances; Oak Lake was approved but Clover Hill was denied.

55. The Board and Commission both knew, at the time that they acted on the Plan, that disapproval of the Plan would be inconsistent with the requirements of the existing

local ordinances. In fact, the members had all received McNear's July 17th and September 28th memoranda recommending changes to the existing ordinances. The amendments proposed in these memoranda clearly were directed at Clover Hill and demonstrated that the provisions of existing law could not be relied on to accomplish the Defendants' predetermined and unlawful desire to deny Pomponio his lawful use of the property.

56. The Commission and Board were both aware of McNear's ongoing attempts to revise the ordinance in order to justify his opposition to the Plan. The unrebutted evidence presented to the Board also demonstrated that the Plan complied with all applicable technical requirements of the local ordinances and that McNear's treatment of the Plan was not only contrary to the existing provisions of the zoning ordinance, but was inconsistent with the Defendants' prior approvals of similar minor residential developments.

57. On October 17, 1989, despite the express requirements of the ordinances, the overwhelming evidence of previous County actions, and its knowledge that McNear's position was unsupported by the existing ordinances, the Board voted unanimously to sustain the Commission's decision disapproving the Plan.

58. On October 20, 1989, the County Administrator wrote Pomponio and informed him that "after considering the issues you raised, the Board concluded that there was no reason to overturn the Planning Commission's decision of August 31, 1989, based on Mr. McNear's interpretation that the Plan, as filed, did not conform to County ordinances."

59. The Board's October 17th meeting, as well as its' October 3rd work session and closed executive session, were chaired by Supervisor James Green. Mr. Green had previously declared his opposition to the Plan, and had publicly stated his support for any action that would delay,

reduce, or restrict Pomponio's lawful use of the property. Despite his manifest bias, Supervisor Green directed the Board's proceedings and participated in its decision and vote on the appeal.

60. The Defendants knowingly and wilfully treated Clover Hill differently from other minor residential developments. Despite requirements of Virginia law that it do so, the Board never identified the specific provisions of the local subdivision ordinance with which the Plan did not comply, nor did it identify the specific corrective steps that would be required to remedy its objections to the Plan. In fact, its decision to disapprove the Plan was not based on the evidence or applicable requirements of law, but as the County Administrator's letter makes clear, was grounded solely on McNear's statements, which were intentionally misleading and deliberately false.

61. The Plan was opposed by a group of local residents. The approval of a Plan is not a plebescite, and neither the Code of Virginia nor the local ordinance provides for the consideration of the opinion of individual residents in the review of subdivision plans. However, despite the ministerial nature of the plan review process, Pomponio alleges, on information and belief, that the Defendants improperly consulted *ex parte* with each other and with members of the general public in meetings and conversations which were not contained in the public record of the proceedings and that the Defendants' individual and collective actions had the improper purpose and effect under color of law of advancing the illicit private purposes and objectives of those private individuals and individual Board members, including Chairman Green, who were opposed to Pomponio's lawful use of Clover Hill.

62. On October 27, 1989, in accord with the applicable provisions of state law, Pomponio noted a timely appeal of the Board and Commission's actions in the Circuit Court of Fauquier County.

63. In order to protect all of his legal rights and to ensure that all reasonable avenues of administrative relief had been pursued, Pomponio had previously filed an appeal with the local Board of Zoning Appeals ("BZA"), despite significant uncertainty whether the BZA possessed jurisdiction over the issues presented.

64. During the proceedings before the BZA, the Defendants continued their persistent pattern of deception which, independently from their conduct during the original consideration of the Plan and the subsequent appeals of its denial, further demonstrated that they knew that their actions were without lawful basis but were deliberately intended to deprive Pomponio of his legal rights.

65. In his initial statement to the BZA, for example, McNear acknowledged that density reduction calculations were *not* in fact, uniformly applied to all minor residential developments, as they had been applied to Clover Hill. He also asserted that he had reviewed each of the minor residential developments previously identified by Pomponio, and that in none of those cases had the maximum density provisions of the ordinance been violated or disregarded. McNear subsequently prepared and submitted to the BZA a memorandum in support of his testimony, in which he asserted without qualification that density reduction calculations had consistently been applied to al minor residential developments, and attached a list of cases which he alleged supported his statement.

66. However, a subsequent review of the cases identified by McNear, identified at least eighteen cases wherein the county's files either contained no record of such density reduction calculations, or where the final approved density clearly showed that such calculations simply could not have been performed as McNear alleged. In fact, in several cases McNear's assertions were directly contradicted by the planning staffs' own statements or by statements contained on the approved plans. These cases also demon-

strated that boundary adjustments were also permitted and that McNear's opposition to the Plan was unsupported by his prior application of the ordinances.

67. Furthermore, McNear's own statements demonstrated that density reduction calculations were not required by the local ordinances and, in fact, had not been uniformly applied to all minor residential development. His own testimony clearly demonstrated that he and his staff had knowingly adopted and pursued an arbitrary and discriminatory method of applying such calculations to individual plans on a case-by-case basis.

68. The testimony and evidence presented to the BZA further demonstrated that McNear had knowingly misrepresented the contents of the County's records, as well as his own pattern of prior application of the ordinance. However, as occurred before the Board and Commission, even when confronted with specific evidence of such inconsistent application of law, the Defendants continued to adhere to their arbitrary and discriminatory course of conduct.

69. On February 1, 1990, despite the plain meaning of the ordinance, the overwhelming evidence of prior application of the ordinance, and the contradictory evidence and statements of McNear and the planning staff, the BZA voted unanimously to sustain McNear's interpretation and application of the zoning ordinance. Again, this decision was clearly based not on the evidence or ordinances but on McNear's false and misleading statements and testimony.

70. On March 1, 1990, Pomponio noted a timely appeal of the BZA's decision in the Circuit Court of Fauquier County.

71. The Defendants have knowingly adopted and pursued a policy of arbitrary and discriminatory application of their land use regulations and processes. The purpose and effect of these policies and action is to unlawfully

discriminate against persons like Pomponio and impose illicit and unlawful restrictions on their use of their property.

72. Although repeatedly put on notice of the terms of the existing ordinances, the County's prior application of these ordinances and of McNear's false statements, the other Defendants knowingly and wilfully acquiesced in and adopted his false and deceptive statements and actions as their own.

73. The Defendants arbitrarily and capriciously disregarded the procedural and technical requirements of their own ordinances, as well as the overwhelming evidence of discriminatory and unfair treatment, and instead knowingly adopted McNear's false and conclusory arguments as their own.

74. The Defendants' actions were deliberately orchestrated pursuant to a scheme to obstruct and interfere with Pomponio's lawful use of the Clover Hill property. The purpose and effect of these actions were to delay and ultimately prevent Pomponio's lawful use of the property in order to achieve the illicit personal objectives of the Board and certain other citizens.

75. The actions described in this Complaint were taken under color of state law and were directed specifically at Pomponio for improper, discriminatory and unlawful purposes which were not reasonably related to the legitimate interests of public health, safety or welfare.

76. Under Virginia law, the review and approval of subdivision plans is a ministerial function. Therefore, neither the Board nor the Commission had the discretion to disapprove a plan which complied with the local ordinance, or to arbitrarily disregard the evidence demonstrating compliance, yet they did just that to the Clover Hill Plan.

77. Moreover, Pomponio was entitled to rely on the uniform and fair application of the law by local officials. He

did not assume the risk that the officials of local government, acting under color of law, would wilfully and deliberately misuse their power, authority, and processes to deprive him of his lawful rights.

78. The Defendants' deliberate disregard and manipulation of the law and evidence, including the *ex parte* actions described in this Complaint, rendered the administrative proceedings afforded Pomponio a sham and effectively denied Pomponio his rights under Virginia law, as well as the United States Code and Constitution.

79. In March of 1990, after Pomponio had exhausted all possible administrative remedies and while his appeals were pending in state court, but before relief could be granted, Pomponio lost his contract right to acquire and develop Clover Hill. The loss of Pomponio's contract right rendered ineffective his state remedies, and he was compelled to non-suit his state claims, to pursue relief in this Court.

80. The loss of Pomponio's contractual rights to Clover Hill was directly and proximately caused by the Defendants' deliberate and arbitrary misuse and misapplication of their power and authority under the color of law to unreasonably delay and interfere with his lawful use of the Property.

81. As a direct and proximate result of the Defendants' wilful and unlawful actions, Pomponio lot all of the money he had invested in acquiring the Clover Hill property, and in preparing the Plan. He also lost his anticipated profits had he been able to pursue his proposals to fruition.

82. The Defendants knew, or should have known, that their unlawful actions would cause Pomponio serious financial damage, including, but not limited to, the loss of his contract rights to purchase Clover Hill and that he would, and in fact did, suffer significant and irreparable economic harm, including the loss of profits and expenses and damage to his business reputation, as a direct and

proximate consequence of the Defendants' unlawful actions.

83. The conscious and deliberate disregard of the law and facts by the Defendants described in this Complaint demonstrates that it would have been futile for Pomponio to submit additional development plans to the County for review. Furthermore, under Virginia law, variances, administrative relief and damages are not available for the wrongful disapproval of a subdivision plan.

84. Pomponio has no adequate remedy at state law, and has suffered irreparable injury as a direct consequence of the Defendants' actions.

COUNT I

DEPRIVATION OF PROCEDURAL DUE PROCESS ACTIONABLE UNDER 42 U.S.C. § 1983

85. The allegations contained in each of the foregoing paragraphs are incorporated herein by reference.

86. Pomponio had a property interest in the development of Clover Hill as a minor residential development recognized under Virginia law. This interest was defeated by the Defendants' knowing wilful manipulation and abuse of the County's development review process.

87. The procedural appeals provided by Defendants were a sham, and the actions of Defendants effectively denied Pomponio the procedural due process required by the United States Constitution as a prerequisite to the deprivation of a property right by the application of public authority.

88. In acting to disapprove the Plan for Clover Hill in the fashion set forth and described in this Complaint, the Defendants, jointly and severally, have acted under color of law to deprive Pomponio of the procedural due process rights guaranteed him under the Fourteenth Amendment to the United States Constitution.

89. The denial of Pomponio's constitutional rights, under color of state law and local ordinances, is actionable in this Court under the provisions of 42 U.S.C. § 1983.

90. The actions of the Defendants described in the Complaint have directly and proximately caused damages to Pomponio in excess of Twelve Million Dollars ($12,000,000).

COUNT II

DEPRIVATION OF SUBSTANTIVE DUE PROCESS ACTIONABLE UNDER 42 U.S.C. § 1983

91. The allegations contained in each of the foregoing paragraphs are incorporated herein by reference.

92. The actions and decisions of the Defendants were outrageous, arbitrary and capricious, and bear no substantial or rational relationship to the public health, safety or welfare.

93. In acting to disapprove the Clover Hill Plan in the fashion set forth and described in the Complaint, the Defendants, jointly and severally, have acted under color of law to deprive Pomponio of his substantive due process rights guaranteed him under the Fourteenth Amendment to the United States Constitution.

94. The denial and deprivation of Pomponio's constitutional rights, under color of state law and local ordinance, is actionable in this Court under the provisions of 42 U.S.C. § 1983.

95. The actions of the Defendants described in the Complaint have directly and permanently caused damages to Pomponio in excess of Twelve Million Dollars ($12,000,000).

COUNT III

DENIAL OF EQUAL PROTECTION OF THE LAWS ACTIONABLE UNDER 42 U.S.C. § 1983

96. The allegations contained in each of the foregoing paragraphs are incorporated herein by reference.

97. The Defendants' dissimilar treatment of the Clover Hill Plan, as compared to similarly-situated properties, without a rational or legally sufficient basis therefor, constitutes a denial and deprivation of the equal protection of the laws secured to Pomponio by the Fourteenth Amendment to the United States Constitution.

98. This denial of Pomponio's constitutional rights, under color of state law and local ordinances, is actionable in this Court under the provisions of 42 U.S.C. § 1983.

99. The actions of the Defendants described in this Complaint have directly and proximately caused damages to Pomponio in excess of Twelve Million Dollars ($12,000,000).

PRAYER FOR RELIEF

WHEREFORE, Pomponio, by counsel, prays that this Court grant him the following relief:

1. Enter judgment against the Defendants, jointly and severally, finding that the Defendants' actions were an unlawful violation of Pomponio's rights to substantive and procedural due process and the equal protection of the laws and, as such, to have been unlawful and unenforceable and that the Defendants are liable for the damages experienced by Pomponio.

2. Award Pomponio compensatory damages in the amount of Twelve Million Dollars ($12,000,000) for the aforesaid violation of his constitutional rights.

3. Award Pomponio his reasonable attorneys' fees under the provisions of 42 U.S.C. § 1988.

4. Grant such other and further relief as the Court may deem appropriate.

Respectfully Submitted,

/s/ Arthur M. Pomponio
Arthur M. Pomponio

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